TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 135.

FRANKLIN BIEN, PLAINTIFF IN ERROR,

vs.

BEVERLY R. ROBINSON, RECEIVER OF THE PROPERTY AND ASSETS OF THE HAIGHT & FREESE COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 16, 1906.

(20,423.)

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 8, 1906.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Judges of the Circuit Court of the United States for the Southern District of New York, Greeting:

Because in the record and proceedings as also in the rendition of the order or decree of a plea which is in the Circuit Court before you or some of you between Franklin Bien, plaintiff in error, and Beverly R. Robinson, receiver of the property and assets of the Haight and Freese Company, defendant in error, a manifest error hath happened, to the great damage of the said Franklin Bien, plaintiff in error, as is stated and appears by their complaint, we being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf,

Do command you in judgment be therein given, then under your seal distinctly and openly you send the record and proceedings aforesaid and all things concerning the same to the judges of the Supreme Court of the United States at the Capitol in the State of Washington, together with this Writ so that you have the same at the said place, before the judges aforesaid, within thirty
2 days, that the said record and proceedings aforesaid being inspected the said judges of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 16th day of June, in the year of our Lord one thousand nine hundred and six and of the independence of the United States the one hundred and thirtieth.

[Seal United States Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States for the Southern District of New York.

The foregoing Writ is hereby allowed.

E. HENRY LACOMBE,
United States Circuit Court Judge.

UNITED STATES OF AMERICA, *Southern District of New York, ss:*

I, John A. Shields, Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, by virtue of the foregoing Writ of Error, and in obedience thereto, do hereby certify that the following pages, numbered from four to ninety-six inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the cause of Franklin Bien, Plaintiff in Error, against Beverly R. Robinson,

Receiver of the property and assets of the Haight and Freese Company, Defendant in Error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 11th day of October, in the year of our Lord one thousand nine hundred and six, and of the Independence of the United States the one hundred and thirty-first.

[Seal United States Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS, *Clerk.*

3 [Endorsed:] E. & AC. 2471. U. S. Circuit Court. Franklin Bien, Plaintiff in error, against Beverly R. Robinson, &c. Defendant in error. Orig. Writ of Error. Albert I. Sire, Attorney for Plff. in error, 99 Nassau Street, Bennett Building, New York City. Service of a copy of the within — is hereby submitted. Dated, New York, New York, June 18, 1906. Frederick J. Moses Attorney for deft. in error. U. S. Circuit Court. Filed Jun- 19 1906. Southern District, New York. John A. Shields, Clerk.

4 At a Stated Term of the Circuit Court of the United States for the Southern District of New York held at the General Post Office in the City, County and State of New York, on the 9 day of May, 1905.

Present: Hon. E. Henry Lacombe, United States Circuit Judge.

RIDGWAY BOWKER
vs.
HAIGHT AND FREESE COMPANY AND OTHERS.

In Equity.

On reading and filing the bill in equity herein, sworn to May 9, 1905, and the affidavits of Ridgway Bowker and John M. Warwick, sworn to May 9th, 1905, and the affidavit of Arthur M. Johnson, sworn to May 8th, 1905, and on reading and filing a certified copy of the decree of the Circuit Court of the United States for the District of Massachusetts, appointing James D. Colt, receiver of the above named defendant, Haight and Freese Company, and it appearing that the said receiver has duly qualified in said Circuit Court of the United States for the District of Massachusetts.

Now on motion of William P. Maloney, Esq., solicitor for complainant, Roger Foster, Esq., of counsel for James D. Colt,
5 said receiver appointed as aforesaid by the Circuit Court of the United States, District of Massachusetts, as aforesaid, of the defendant Haight and Freese Company, appearing on behalf of the said receiver; and admitting and confessing the allegations in said bill, and consenting to this order and decree on behalf of said defendant Haight & Freese Company, it is

Ordered adjudged and decreed and I hereby order that James D. Colt, of Boston, Massachusetts, and Walter D. Edmonds, Esq., of New York City, be and they hereby are appointed receivers (both original and as ancillary to said decree of the Circuit Court of the United States for the District of Massachusetts) of all the property and assets of said defendant Haight & Freese Company, to receive, collect and take possession of all the property of said defendant Haight & Freese Company, including all its assets, choses in action, accounts, books of accounts, correspondence, papers and memoranda, whether in possession of the said defendant Haight & Freese Company or of any other person acting in behalf of said defendant and hold the same awaiting the further order of this court, provided that said receivers shall take no action until they shall file a bond in the sum of Ten thousand dollars in this court, conditioned for the faithful performance of their duties as such receivers with good and sufficient surety and that as soon as they shall collect funds or assets of said defendant, Haight and
6 Freese Company, they shall report the amount thereof from time to time to this Court, in order that the amount of such may be increased if necessary and it is hereby

Ordered, adjudged and decreed, and I hereby order that the said defendant, Haight and Freese Company, its officers, agents, servants and assigns, and the Seaboard National Bank, the Consolidated National Bank, the Produce Exchange Safe Deposit and Storage Company, John Doe and Richard Roe, and all other persons and corporations that may have in their possession and control any property, effects or credits belonging to the said Haight and Freese Company, or standing in its name or in the name of William H. Lillis, George G. Turner, Harvey Watson, Charles B. Poor, Junior, William G. Conkling, — Beardsley, either as officers of said defendant, or individually, be and they hereby are enjoined and restrained and stayed until the further order of this court from paying over or transferring any of said money, property, effects, or assets to any person other than said receivers, and from permitting any person other than said receivers to remove the contents of any safe deposit company box or vault or bank standing in the name of said defendant, Haight and Freese Company, or in the names of either of the officers or employées of the said above mentioned Haight and Freese Company, or either of the above named persons, and they and each of them are hereby directed to deliver
7 up the same to the said receivers forthwith, and it is

Further ordered that either of said receivers may take possession upon his qualification without waiting for the qualification of the other; and that no funds be removed from the jurisdiction of this court, except upon a further order of the court, and I hereby

Further order that the said defendants and each of them show cause before me or such Judge of this Court as may then be holding the motion calendar, on the 12th day of May, 1905, at eleven o'clock A. M., or at such other hour as said motion calendar may be called

on said day, at the Court House of the Circuit Court of the United States for the Southern District of New York, in the General Post Office, County of New York, Borough of Manhattan, City and State of New York, why a writ of permanent injunction should not issue in accordance with the terms of this order, and why the said receivership should not be made permanent and why the complainant should not have such other and further relief as to the Court may seem just.

And sufficient cause appearing, service of this order and such other affidavits as may be served twenty-four hours before said return day shall be sufficient service thereof.

May 9, 1905.

E. HENRY LACOMBE, *U. S. C. J.*

8 In the Circuit Court of the United States for the Southern District of New York. In Equity.

STATE OF NEW YORK, *City and County of New York, ss:*

RIDGWAY BOWKER, being duly sworn, according to law, deposes and says:

I am the plaintiff in the Bill sworn to in the above entitled action May 9, 1905. I reside at Camden in the State of New Jersey and am a citizen of the said State of New Jersey. The defendant Haight & Freese Company mentioned and described in the said bill is a corporation incorporated under the laws of the State of New York, and is a citizen of the said State of New York, and has its principal place of business at No. 53 Broadway, Borough of Manhattan, City of New York, and is doing business in the said City and State, and also in Boston in the State of Massachusetts, and Philadelphia in the State of Pennsylvania, and elsewhere. Said defendant is incorporated to carry on the business of buying and selling stocks, bonds, securities and commodities upon commission and to execute orders for the purchase and sale of such stocks, bonds, securities and commodities. The defendant The Consolidated National Bank of New York, is a national bank organized under the laws of the United States and has its principal place of business at the City and

9 State of New York. The defendant The Seaboard National Bank is a bank incorporated under the laws of the United States and has its principal place of business at said City and State of New York. The defendants John Doe and Richard Roe are citizens of the State of New York. That said defendants, other than the said Haight & Freese Company, have funds within the City and State of New York in their possession belonging to the said defendant Haight & Freese Company. That the principal assets of said Haight & Freese Company are situated at Boston in the State of Massachusetts. It also has assets and property within the City and State of New York.

On or about the 20th day of July, 1903, deponent went to the office of Haight and Freese Company which is maintained by it at Philadelphia in the State of Pennsylvania to become a customer of the said defendant and to deal in the purchase and sale of stocks, bonds

and commodities upon margin. Deponent had seen advertisements of the said defendant in the press of the said city of Philadelphia, and in response to one of said advertisements sent for a book described by the defendant as a guide to investors. When deponent called at the office of the defendant he asked for the manager and was introduced to one George G. Turner, who was a director and manager of the defendant. The said Turner in turn introduced deponent to one A. B. Daniels, who was in their office. Turner said that Daniels had made a great deal of money for their customers by manipulating their accounts and by being permitted to exercise his discretion therein by means of having a power of attorney executed by the customers authorizing him to give orders in such customers' accounts and such power of attorney to be deposited with the defendant. Deponent conversed with the said Turner and Daniels and they exhibited a pamphlet purporting to show the names of various customers who had made money through such an arrangement. Deponent thereupon deposited one hundred and fifty dollars, ($150). That Turner said that Daniels was a good reliable trader associated with them, that he represented a number of accounts, and that he made money for many customers through the said corporation of Haight & Freese Company. Deponent drew a power of attorney which in substance authorized the said Daniels to give orders in deponent's accounts with the said defendant and the next day brought it to defendant and delivered it to it. That from time to time thereafter deponent deposited with the said defendant various sums of money which aggregated Thirty-three hundred and fifty dollars, ($3350). Seventeen hundred dollars, ($1700) of the above sum was deposited to invest in deponent's name, but on or about October 1st, 1903, said Daniels informed deponent that he should not deposit any more money in deponent's name, but that deponent should deal under the name of L. Rothschild.

On or about October 3rd, 1903 deponent deposited with the said Daniels the sum of Fifteen Hundred dollars ($1500) which was deposited by Daniels with the said Haight & Freese Company under the name of L. Rothschild; on or about November 1st, 1903, deponent again deposited with the said Haight & Freese Company the sum of One hundred and Fifty dollars, ($150).

Deponent was informed by the defendant Haight and Freese Company and Daniels on or about January 1st, 1904, that his account had been closed out on account of the slump in stocks. Deponent protested against this informing the defendant that it had no right to close deponent out without notice and was then informed by the said manager Turner that the defendant would reinstate him on its books. Deponent informed the said Turner that the L. Rothschild account was his, deponent's account and said Turner told him that it was no news to him, and that he had known said account was deponent's account all the time.

Said defendant never invested the moneys so deposited by deponent with it, but only pretended to do so and charged deponent commission on each transaction and at the same time, without deponent's knowledge, charged a commission to the alleged other party

to the transactions. It also charged deponent with interest on the difference between the margin deposited by him and the alleged cost price of the said stocks and securities and commodities pretended to be purchased and sold under deponent's account, representing and pretending that such difference was borrowed on the said stocks, securities and commodities, whereas in fact said defendant never
12 borrowed any moneys thereon but said balances and alleged loans were wholly fictitious and fraudulent. That said defendant kept sending alleged notices of purchases and sales and letters and accounts purporting to show stocks and commodities bought or sold according to deponent's orders, but said stocks and commodities were never bought by the defendant and said transactions were all merely book entries.

That the defendant has on its orders and notices an alleged contract which is set forth in the Bill of Complaint verified by deponent on the 9th day of May, 1905, that deponent believed the said defendant to be a legitimate brokerage house but said defendant is merely using its corporate form for the purpose of pretending to carry on a commission and brokerage business and to disguise and conceal the real nature of its business, and in an attempt to protect the individuals carrying on the said business from personal liability, whereas in fact the said business is a mere swindling device known as a bucket-shop. The defendant places large advertisements in the newspapers to induce the public to deal with the defendant.

Instead of investing the money placed in its hands the defendant's officers and persons controlling the corporation withdraw the moneys deposited with its customs by means of checks and fictitious accounts and appropriate the same to their own use. That defendant
13 is not a member of any legitimate stock exchange but pretends to transact its business on the New York Stock Exchange but said defendant is not a member of the New York Stock Exchange, but for the purpose of covering up the real nature of its transactions it has had several persons in its employ members of a fraudulent corporation or organization known as the Consolidated Stock Exchange of Philadelphia, and by means of said Exchange and through the members in its employ thereon, has been pretending to execute the orders received by it, where in fact no orders were executed at all, but the transactions were offset one against the other by the said defendant and its employees on said Exchange. That where the transactions of the defendant on said Exchange for a day, upon the settlements made, would show profit, defendant has so manipulated the said transactions to show a loss to one of its employees, on the said Exchange and thereupon checks would be given to said alleged Clearing House on said Exchange for such loss and said checks endorsed over through the employees of the defendant back to the defendant's officers and deposited by the defendant's officers in their own accounts, and thereby diverting the same from the defendant corporation. That deponent has seen the original checks so put through this Clearing House and endorsed in the manner above described, and has also seen the original Clearing House sheets showing

these transactions as above described. That said Exchange
14 was a fraudulent Exchange and the Attorney General of the State of Pennsylvania has issued suggestions for a *quo warranto* against the said Exchange and thereupon proceedings have been instituted and a receiver of said Exchange appointed and the property, sheets and checks as aforesaid have been taken into the possession of the said receiver. Said defendant also has fraudulent and fictitious accounts through which its officers draw out alleged profits and appropriate such moneys to their use. The defendant has no capital account and no capital but uses the moneys received from customers in its business operations as above described. It keeps no record books of account but has manufactured and keeps false and fraudulent books.

That in an action in the Supreme Court in the State of New York entitled William C. Haight, plaintiff, against Haight & Freese Company, defendant, wherein defendant had been charged with similar acts, the Supreme Court made a decision on or about the 6th day of March, 1905, of which a copy is hereto annexed marked Exhibit "A."

The defendant where it is required at times to deliver stock to its customers purchases the stocks at the prices then existing instead of the prices existing at the time of the original orders and in such instances makes large profits in many cases as much as 50 to 100 % at the expense of its customers. That said defendant has creditors exceeding five thousand (5000) in number whose claims exceed One million dollars, ($1,000,000.) and that said defendant uses
15 for the purpose of defrauding its customers the stock quotations from the New York Stock Exchange, and other leading exchanges throughout the United States. That the defendant has a Vice President, one William H. Lewis who was a director and who resides in Massachusetts, and that defendant has no president and that said Lewis is also Treasurer of the said defendant; that one George G. Turner is a director and manager of the defendant and is the assistant Treasurer of the defendant; that Harvey Watson who resides in the City, County and State of New York is a director and secretary of the defendant.

That the defendant has part of the moneys of its said creditors and customers deposited in the Seaboard National Bank and the Consolidated National Bank in the City, County and State of New York, which are national banks organized under the laws of the United States and having their principal places of business in the said City, County and State of New York. It also has funds and moneys deposited and kept for concealment in the name of John Doe and in the name of Richard Roe who are citizens of the City, County and State of New York, and in the names of the said Lewis, Turner and Watson, and others unknown to the plaintiff.

That said defendant corporation was organized ostensibly to take over the business of a co-partnership known as Haight &
16 Freese formerly of the City, County and State of New York, alleged stockbrokers, which said firm was also engaged in the same fraudulent business as said corporation. That the man Freese who was formerly connected with said corporation is no longer

connected with the said co-partnership or corporation, but is departed from the United States and is living at London, England; and the said Haight whose name was used in the formation of said corporation is in the employ of the defendant on a small salary at its office in Philadelphia, Pennsylvania.

That said defendant induces the customers to deal in said stocks, securities and commodities upon very small margins, and so manipulates the accounts so as to show a loss therein to the customer.

That in an action similar to this brought in the United States Circuit Court for the District of Massachusetts, a receiver of the said defendant has been appointed by the said United States Circuit Court, a certified copy of the bill and decree in which are hereto annexed, marked Exhibit "B."

That in the said fictitious accounts kept by the defendant, its officers give orders after the closing of the market, so as to show large profits therein, and these profits are drawn out by the defendant's officers.

That said defendant is insolvent and has not sufficient assets to pay its debts, and has the moneys and property of its customers as its only means of carrying on the business above described.

17 That the defendant's officers are withdrawing the said moneys and appropriating them to their own use, and turning them into stocks and bonds, and depositing and secreting them in their own names in various vaults, banks and safe deposit companies. That James D. Colt has been appointed receiver of all the property of the defendant by the Circuit Court of the United States for the District of Massachusetts, and said receiver has duly qualified.

That the Produce Exchange Safe Deposit and Storage Company is a corporation organized under the laws of the State of New York, and has its principal place of business in the City, County and State of New York, and has safe deposit vaults containing property belonging to the defendant.

No previous application has been made for this order or decree.

RIDGWAY BOWKER.

Subscribed and sworn to before me this 9th day of May, 1905.

J. ALBERT WOOD,

Commissioner of Deeds in and for City of New York.

18 United States Circuit Court for the Southern District of New York.

RIDGWAY BOWKER
against
HAIGHT & FREESE COMPANY and Others.

CITY AND COUNTY OF NEW YORK, *ss:*

Arthur M. Johnson, being duly sworn deposes and says: I am a married man and reside with my wife and one child at 502 West 152nd Street, Borough of Manhattan, City of New York. I am

twenty-nine years of age. I know the defendant Haight & Freese Company. I was employed by that company from on or about April 1901 to August 1904. When I first went into the employ of the defendant I was employed at their principal office, 53 Broadway, Borough of Manhattan, City of New York as mailing clerk. I remained in that position one month, and I was then made margin clerk, and in that position I remained about nine months at the same office. At the expiration of that period I was made cashier and remained in that capacity in the same office until about the 17th or 18th of December, 1902. Immediately after that I was transferred to the Buffalo office, and went there in the capacity of cashier arriving in Buffalo on or about the 18th or 19th of November,
19 1902. The offices in Buffalo of which I had charge were located at 762 Ellicott Square Building, on Main Street, in Buffalo. The general manager and treasurer of the Company at that time was John M. Campbell. He at that time was a resident of Brooklyn, that is to say his wife and family resided in Brooklyn, in the City of New York, but he lived at the Browzel House, on Seneca Street in the City of Buffalo. Campbell now resides in Buffalo; I do not know his exact residence, I can find that out. I remained in Buffalo as cashier until June 17th, 1903, when I was made general manager of the defendant, and at the same time I became a director. I remained in Buffalo in that capacity until about July 31st, 1903, when I removed to Philadelphia, Pennsylvania, the entire plant being removed from Buffalo to Philadelphia. I was the general manager in charge of what they called their Southern and Western Circuit. The offices in Philadelphia were located at 546 and 548 Bourse Building, between Fourth and Fifth Streets, near Market and Chestnut. That office was kept for about six weeks. The offices were then changed to 555 and 556 in the same building, and they continued there until the time I left, which was in August, 1904. During all that period from the time I became a director in Buffalo, above specified, until August 1904, when I left I was a director of the company, and owned ten shares of stock therein. These ten shares of stock were transferred to me by Mr. Summerville, the President of the Company. The shares were handed to me and endorsed by me in blank.
20 I knew Mr. Campbell and Mr. George G. Turner, and Mr. Summerville, the President, and Mr. W. H. Lillis, all of these parties were at various times directors of the Company. I also knew John Kenney. He was a director of the defendant. Summerville, the President, and Campbell left the Company about June 17th, 1903. They sold out their interests to Turner and Lillis. Campbell was merely the nominal owner of shares of stock, the same as myself. I did not pay anything for my stock, nor did he. I was on a salary during all the time that I was employed by the defendant. The salary of Vice-President Lillis was voted in the directors' meeting to be and was Fifty Thousand dollars per annum, and the salary of George G. Turner, who is assistant treasurer, and also manager was Thirty-five thousand dollars per annum. These salaries were voted at a Board of Directors' meeting at which I was present. When

Campbell and Summerville left about June 17th, 1903, Turner and Lillis took over the property of the Company, but Turner and Lillis had been directors prior to that time. John J. Kenney and Harvey Watson, who is on a salary, became directors of the company at or about December 1903 or January 1904. Kenney received a salary of about $35 a week, and Watson about $50 a week.

In the early part of 1903, some time before Decoration Day, Thomas Fahey, who was the attorney for the defendant above named in an action entitled Supreme Court, New York County, William C. Haight, plaintiff, against Haight & Freese Company, defend-
21 ant, came to Buffalo, where I was, with Mr. George G. Turner. Mr. Campbell gave me instructions to make up statements of the account of one William C. Haight, and his allied accounts, which consisted of the W. C. Haight account, J. Zimmerman account, F. W. Clinton account, John Dough, account and Wheat account, and also to make up a statement of the account of Ferdinand Delenne, who was also suing the defendant. The only books or documents in the possession of the Company from which to make up these statements were sheets kept by the defendant, Haight & Freese Co., showing the trades each day. When an order was received from any person at any branch office it was wired to the New York office; the Company had private wires to all its branch offices. At Buffalo we used what was known as the fast Western Union Telegraph Company wire, which gave us the quotations of the New York Stock Exchange, and at Buffalo we also used a ticker, and in New York and in Philadelphia we used what is known as Marrin wires, from which we received the quotations of stocks on the New York Stock Exchange. As each order was received either for a purchase or a sale, for a customer, it was entered on sheets of paper by clerks for that purpose. No orders were executed at all; no stocks were bought, and no stocks were sold, at all where the accounts were on margin, merely the next quotation of stock received over the wire reporting the New York Stock Exchange quotations was used as the price at which the order was filled by the Company.

They did buy and sell some cash stocks, that is to say, stocks
22 where the delivery of the stocks were required by the customer and paid for in full. These stocks they bought and paid for outright. The Company never had any certificates of stock which it held in its possession, except the cash stocks, as I have above described, except stocks which had been deposited with the Company by customers as margin, and this last mentioned stock was kept track of in a book called collateral or stock book. No other book was kept by the defendant showing the possession by the Company of any certificates of stock. This collateral or stock book contained the number of certificates of stock deposited as collateral by customers with a description of such stock, that is, the name, number of shares, etc. There were exceptional instances where some trades were actually given to either the Consolidated Exchange brokers or to the New York Stock Exchange brokers. Those exceptional cases were cases where a customer required names to be furnished to him

or where he was fortunate in his speculations, and they purchased the stock to protect themselves against his transactions. In such cases where the orders were in fact given to the broker to execute, either on the Consolidated Exchange or the New York Stock Exchange, the transaction was indicated in this way on purchase or sale order which is signed by the customer or signed on his behalf by somebody in their employ; where the order is received over the telephone or orally is stamped with a rubber stamp with the initials of the name of the broker through whom the order was executed.

23 These instances were comparatively rare.

After receiving instructions from Mr. Campbell I had drawn up by the bookkeepers in the Buffalo office these statements showing the accounts of Haight above mentioned and the Delenne account. A few weeks later Mr. Fahey and Mr. Turner again came to Buffalo, and they told me to take these statements and go through the sheets from which the statements had been made up, and find the names of other persons who had given orders to buy and sell which would answer to cross the purchase or sale made by Haight and Delenne. I had bookkeepers and myself go through these sheets and find a list of names to offset or cross the entries of purchases and sales entered on the sheets for Haight in his accounts, and in the Delenne account, but we did not find a sufficient number of names to cross with all the entries in Haight's account. A short time afterwards Mr. Campbell told me to enter all these names in blotters which were large books furnished by the Company, and with several bookkeepers we worked for nearly two months writing up a whole lot of books called blotters giving the dates, names, amounts and commissions. These blotters were numbered from 1 to 108. I took the numbers from calendars and pasted them on the backs of the books. These were the books that were exhibited to Haight, in an action brought by him in the Supreme Court, New York County, against the defendant, Haight and Freese Company, on his inspection of Haight & Freese Company's books.

24 For those trades of Haight for which we could find no cross trades in the sheets, Mr. George G. Turner obtained copies of the New York Evening Sun, which were kept on file in the Philadelphia office, and from these New York Sun papers he took the Stock Exchange quotations, and made up new sheets showing purchases and sales to fill out a number of accounts where we could not find cross trades for them, including the accounts of William C. Haight above mentioned. I saw him write a part of this myself at the Philadelphia office. When the sheets thus made up by Mr. Turner were finished he turned them over to me and I had a man named Edwin K. Martin, of Philadelphia, Pennsylvania, copy these sheets into a book called the C. H. Burt book, which purported to be trades made with C. H. Burt. There was an agreement with C. H. Burt that he was to pretend to execute orders the reverse of the order given by the customer. C. H. Burt was not a member of the Consolidated Exchange at all during the period in 1902, or part of the period in which this account was made up.

Mr. Turner told me that Haight's attorney would not know enough to find out whether Burt was a member of the Exchange at that time or not.

This account book called the C. H. Burt book was written up by Martin in or about the month of August, 1903. Martin was in the employ of the defendant at the time that I left their employ. He was a cripple. The book took only a few days to write up, and it was brand new in appearance, while the other books which we had made up in Buffalo were soiled, because it took several months to write them up and they were used rather roughly. I believe that this book, as soon as it was finished in August, was sent by express to the office of Thomas Fahey, 99 Nassau Street. Chauncey H. Burt, the man with whom these transactions were pretended to be had, went into the employ of the defendant on a salary in or about the month of August or September, 1903, and he continued in their employ at a salary in their Philadelphia office up to the time that I left in 1904, and deponent verily believes that he is still in the employ of the defendant. He had a salary of $35 a week.

Many of the facts herein stated can be verified by the above named Edwin K. Martin, and by John M. Warwick of 298 De Witt Street, Buffalo, New York. There are other names of persons, all of whom I can get, who can verify some of these facts.

On the 6th day of March, 1905, I saw the book called the Chauncey H. Burt book. I saw this book at Special Term, Part IV. of the Supreme Court, at the County Court House in the City Hall Park, New York City. It was enclosed in wrapping paper, and tied round with twine. It was addressed on the outside "For Mr. Thomas Fahey, 99 Nassau Street, New York, N. Y." There was a sticker on the same side as the address of the Adams Express Company, which said the package was from "Adams Express Co., of Philadelphia, Pa." And in large type "Paid," opposite which was the signature "Link." It also had on it "From Haight & Freese Co., 417 Walnut St., Phila., Pa." It was also stamped with a rubber stamp "Adams Express Company, 77 Philadelphia." These words were in large type and enclosed within a square made by a rubber stamp. The wrapping paper was taken off and the book was opened, and it contained the words inside on the second fly leaf "Chauncey H. Burt, 60 Broadway, New York." This was in the handwriting of Edwin K. Martin, an employé in the office of Haight & Freese Company at Philadelphia, who is the man I saw writing the book in August, 1903. On the inside of the cover the book was marked "Haight *v.* H. & F. Co., D'f'd'ts Exhibit 1, page 24, marked for identification, Robert L. Cutting, Sept. 11, '03." Also marked on the same page, inside the cover, "Exhibit F. Delenne *vs.* H. & F. Co., Sept. 11, '03, C. W. B." Also marked Def'ts Ex. A, Haight *vs.* H. & F. Co., Sept. 22, '03, C. W. B."

This book contained 400 pages; the last entry was on page 185 under date of November 29th, 1902. This was the book written up in the office of the defendant company in August, 1903, to which I have previously referred. The book had no connection with any

account at all, no ledger pages, and did not show any postings. This book which I saw, as above described, is the same book to which I have previously referred and I have identified it as the book. All the entries in the book are in the handwriting of this Edwin K. Martin of Philadelphia, Pennsylvania.

While I was in the employ of the said Haight & Freese
27 Company they had no regular books kept showing the capital account of the Haight & Freese Company, that I am aware of, and I had charge of all the books that were in the main offices in Philadelphia and Buffalo at the times specified in the said affidavits above referred to. Said defendant kept in its ledger two accounts under the name of William Broadhurst and one Luke. Neither of these accounts was a real account. It was the practice of the defendant to use these accounts to withdraw moneys from the corporation's assets by giving fictitious orders in said accounts showing large profits, which profits were drawn out by the officers of the defendant, to wit; George G. Turner and William H. Lillis; and many of these orders were given after the close of the market so as to show profits.

Deponent further says that the Haight & Freese Company had members on the Consolidation Stock Exchange in Philadelphia, through whom it pretended to execute orders for the purchase and sales of stocks, bonds, etc., one of these men was Chauncy H. Burt. The said Burt was employed on a salary by the defendant from on or about August, 1903, and was so employed down to the time that I left the defendant. I have seen writings in the handwriting of George G. Turner, one of the directors of the defendant and its manager, referring to payments to Burt on account of his services for the defendant.

The defendant did not really purchase or sell any stocks
28 except as set forth heretofore in this affidavit. In many instances where customers had previously given orders to purchase stock upon margin they subsequently gave orders to deliver to them the stock previously ordered on margin, and the defendant purchased the stock at prices existing at the time of the delivery and charged them to the customers at the prices existing at the time of the original orders. In many instances this resulted in a charge for the stock at double the cost of the stock at the time of the actual purchase.

The defendant had a system on the Consolidated Stock Exchange in Philadelphia, by means of which it drew moneys belonging to defendant's customers in the following way,—If, for example, the result of a day's trade upon the said Exchange showed apparent profit on the settling of the orders for the defendant's customers in the aggregate of Twenty thousand dollars, fictitious orders would be placed upon the sheets of the defendant so as to change the result to an apparent loss of Five thousand dollars. This would necessitate that the defendant should pay into the Clearing House the sum of Five thousand dollars to meet these supposed losses. This Five Thousand dollars would be paid to the Clearing House, and the Clearing House would pay it to the broker representing the defend-

ant, to whom such Five thousand dollars was due on such transaction, this broker being in the employ and pay of the defendant. Such broker would deposit the said money so received to his
29 account, and deliver to Mr. Turner, or some other officer of the defendant, part of the same money, and this money would be withdrawn from the defendant.

I have seen telegrams addressed to the defendant's office from Turner, directing the clerk who pretended to fill the orders in the defendant's office to operate liberally in certain stocks in the Broadhurst account. The defendant did not have loans on its stocks, but charged interest on the difference between the margin and the alleged purchase price of the stocks, except in a few instances.

These moneys withdrawn through the Clearing House and turned over to Mr. Turner were deposited by Mr. Turner in his own name and in the name of Lillis, the Vice-President of the Company, and not turned over to the corporation.

ARTHUR M. JOHNSON.

Sworn to before me this 8th day of May, 1905.

J. ALBERT WOOD,
Commissioner of Deeds in and for the City of N. Y.

30 United States Circuit Court for the Southern District of New York.

RIDGWAY BOWKER
against
HAIGHT & FREESE COMPANY and Others.

CITY AND COUNTY OF NEW YORK, *ss:*

John M. Warwick being duly sworn, deposes and says: I am married, and reside with my wife and family at 298 De Witt Street, Buffalo, New York. I am twenty-four years of age. I was employed by the defendant, Haight & Freese Company, from on or about the latter part of September, 1902, until October 1st, 1904. I went into their employ at the principal office, No. 53 Broadway, Borough of Manhattan, City of New York. I remained there until just before Thanksgiving, 1902, then I was sent to Buffalo with the defendant until July 31st, 1903, when I was transferred to Philadelphia, Pennsylvania. While I was in Buffalo, a number of loose sheets purporting to show purchases and sales of stocks by the defendant on behalf of various persons, were brought to Buffalo from New York. These sheets were the sheets used in the New York office, that is the way in which the trades were shown instead of by means of books, that is to say, when orders were received at the
31 New York office to purchase or sell stocks, it was simply noted on the sheets. These orders were not executed at all. The way in which the defendant pretended to execute the orders was to enter on the sheets the sale or purchase at the price received from Stock Exchange quotations next or subsequent to the receipt of the

order. In the New York office they kept these sheets, and they in some instances kept blotters, but the transactions entered in the blotters were the same as those entered on the sheets, merely noting an order filled by adding to it the next or some subsequent quotation which came from the Stock Exchange. The Buffalo office was kept in the same way with sheets, except that at the New York offices the transfers into the ledger were simply transfers of profit and loss, and in the Buffalo office the transactions were carried into the ledger in full, that is the date, the stock and the total price. When I went to Philadelphia we used blotters there, and the transactions occurred in exactly the same way, blotters being used instead of the sheets. In no case, either on the sheets, or on the blotters, nor at any time was there any record kept of the name of the person with whom the transaction was had, except it was a cash transaction, where the stock was bought and paid for in full and delivery made, and when it was so designated when the order was received by the defendant.

32 Some time in the month of May, 1903, Mr. George G. Turner, the manager of the defendant, and Mr. Thomas Fahey, attorney for the defendant, came to the Buffalo office. Immediately after they came I, with several other bookkeepers in the office, received orders from Mr. Johnson, the cashier or manager, to copy these loose sheets into blotters. After we had written up these blotters, we received instructions to search through the blotters with reference to the account of William C. Haight and one Delenne, and to find out by examination of trades on the same date as trades made for or on behalf of Haight or Delenne what other trades would cross them at the same prices, and the names of such persons. This we did, and made up several lists of names. In some instances we were not able to find sufficient number of cross trades to make up the trades in either the Delenne or Haight accounts, and gave the lists showing this state of facts to Mr. Johnson, the manager. Mr. Johnson informed me that he sent them to Mr. Fahey, in New York. It took us several months to do this work and it was not finished until some time in July, 1903. A week or two after that I went to Philadelphia.

While I was in the Philadelphia office I remember on one occasion Mr. Fahey and Mr. Turner coming over to Philadelphia and asking me to get out the files of the New York Sun. I got out these files of the New York Sun and put them down in front of Mr. Turner and Mr. Fahey. I saw them have sheets in front of them, and I

33 heard them reading from the stock quotations in those files, and saw them writing down on these sheets what they had before them. After these sheets were written by them they were copied by a man named Edwin K. Martin in the Philadelphia office into a book called the C. H. Burt book. I know Martin's handwriting. I saw Martin writing these entries in this C. H. Burt book. I could identify this book if I saw it again.

Before I went into the employ of Haight & Freese Company I worked for about six years in the employ of A. Housman, and De Coppet and Doremus, both of which firms were members of the New

York Stock Exchange. I had charge of the purchase and sale blotters in the offices of those two firms, and I am thoroughly familiar with the manner of executing and entering orders for the purchase and sale of stocks which are executed in the New York stock market. From such experience and from the obvious fact I can say, positively, that no orders were ever executed by the Haight & Freese Company for the purchase and sale of stock except cash purchases which I have mentioned above.

The "Stock Account" which is referred to in the copies of the defendant's books which the defendant has given as the source of the purchase or sale of stock by W. C. Haight in his accounts was simply an account kept at Boston under the title of "Stock Account," which was used by the defendant for the purpose of charging therein or crediting therein entries to balance entries which it was found necessary to take out of other accounts, especially where mistakes were made in other accounts, or where customers complained about
34 the state of their account and disputed the items; or, where the defendant claimed to reinstate the party after the dispute, cross entries would be made to this "Stock Account."

Wherever the defendant had occasion to make cash purchases as above referred to, such purchases were usually made through stock exchange houses. These stock exchange houses were Cohen, Greene & Co., and Beers & Owens. I know of no cash transactions through the Consolidated Exchange.

While I was in the Philadelphia office, one Benjamin Levitt of Coeburn, Virginia, had an account with them in grain. This man Levitt was dealing in grain but no grain was ever purchased for him at all. The way in which all these orders were pretended to be executed was this. The orders were received over private wires from the several branch offices in the executive office, where they employed bookkeepers, operators, and the order clerk who filled all such orders as were placed by the defendant's customers. After the receipt of the order by the operator he made out a ticket describing the order as to the number of shares relative to stock, or bushels relative to grain, as the case might be, and whether it was an order to sell or buy, and the customer's account number, together with the name of the office from where the order was received, and the time the order was received. When this slip was made out a boy took the slip from the operator and handed it to the order
35 clerk, who filled it, if it was a market order, at some subsequent price received over the Company's quotation wires of the prices on the New York Stock Exchange; but if it was a limited order, that is an order having a price attached to it at which the order should be executed, it was retained by the order clerk until the market, as ascertained from the quotations received over the wire of transactions on the New York Stock Exchange, reached that price, and then was marked filled by the order clerk. In the case of grain there was a special wire for this on which the quotations of the Chicago Board of Trade were received, and the quotations of transactions on the New York Stock Exchange, which were received over special wires run by the Company. After the orders

were executed in this manner above described a telegram was sent to the branch office from which the order was originally received that the order had been filled at such and such a price, and in doing so the number of the account was used. Where the orders were received from offices in the State of Massachusetts or New York, or a few of the Philadelphia orders, after these orders were marked filled as above described, sometimes a few minutes after, and sometimes an hour after the orders were reported filled, two men who were employed by the defendant upon a salary, and who were members of the Consolidated Exchange of Philadelphia, would come to the office and make a record of these transactions and they
36 would then put these records into the Consolidated Exchange and have them cleared as transactions between themselves. The transactions were exactly the same in the New York office and in the Buffalo office, while the executive offices were there, except that they did not go through the formality of having the two brokers make records of the trades and clear them through the Exchange.

On the 6th day of March, 1905, I saw the book called the Chauncey H. Burt book. I saw this book at Special Term, Part IV, of the Supreme Court, at the County Court House, in the City Hall Park, New York City. It was enclosed in wrapping paper and tied round with twine. It was addressed on the outside "For Mr. Thomas Fahey, 99 Nassau Street, New York, N. Y."

There was a sticker on the same side as the address of the Adams Express Company, which said the package was from "Adams Express Co., of Philadelphia, Pa.," and in large type "Paid," opposite which was the signature "Link." It also had on it "From Haight & Freese Co., 417 Walnut St., Phila. Pa." It was also stamped with a rubber stamp "Adams Express Company, 77 Philadelphia." These words were in large type and enclosed within a square made by a rubber stamp. The wrapping paper was taken off and the book was opened and it contained the words inside, on the second fly leaf "Chauncey H. Burt, 60 Broadway, New York." This was in the handwriting of Edwin K. Martin, an employee of the office of Haight & Freese Company at Philadelphia, who is the man I
37 saw writing the book in August, 1903. On the inside of the cover the book was marked "Haight *v.* H. & F. Co., Dedts. Exhibit I, page 24, marked for identification, Robert L. Cutting, Sept. 11, '03." Also marked on the same page, inside the cover, "Exhibit F. Delemne *vs.* H. & F. Co., Sept. 11, '03, C. W. B." Also marked "Def'ts Ex. A, Haight *vs.* H. & F. Co., Sept. 22, '03, C. W. B."

This book contained 400 pages; the last entry was on page 185 under date of November 29th, 1902. This was the book written up in the office of the defendant Company in August, 1903, to which I have referred heretofore in this affidavit. The book had no connection with any account, at all, no ledger pages, and did not show any postings. This book which I saw, as above described, is the same book to which I have made reference in my affidavit of March 2nd, 1905, and I have identified it as the book. All the entries in the

book are in the handwriting of this Edwin K. Martin of Philadelphia, Pennsylvania.

While I was in the employ of the said defendant they had no regular books showing the capital account of the defendant. I am a bookkeeper by occupation. I saw all of the books kept in the Boston office, in the Philadelphia office, and the Buffalo office, and in the New York office. At the Boston office they kept duplicates of all the books in the other office. The defendant had no books in any of those offices showing capital account or any capital of the defendant. The defendant kept in its ledger two accounts,
38 one under the name of William Broadhurst, and one under the name of Luke. Neither of these accounts was a commission account. It was the practice of the defendant to use these accounts to withdraw moneys from the corporation's assets, giving fictitious orders in said accounts showing large profits, which profits were drawn out by the officers of the defendant. Many of the orders given in these accounts were given after the close of the market so as to show profit, and did show a profit, and there was not an order in the said account that showed a loss. That was what attracted my attention to these accounts, that they were always profitable, whereas all the other accounts were unprofitable to the customers. Only in rare instances would a customer draw anything in the way of profits.

Deponent further says that the defendant had members on the Consolidated Stock Exchange of Philadelphia, through whom it pretended to execute orders in bonds, stocks, etc. One of these men was Chauncey H. Burt. Another of these men was E. L. Johnson, and for part of the time while I was in their employ, to wit: for about a month before I left the defendant's employ, one Edwin K. Martin was also on the said Exchange. It was the practice of the defendant to pretend to execute these orders on the Consolidated Exchange by having these members of the Consolidated Exchange come in every half hour or hour, and get the orders and take them over and clear them on the Clearing House of the Consoli-
39 dated Stock Exchange. I knew this by seeing the sheets afterwards with the clearances, and these orders would be between the two men representing the Haight & Freese Company.

The defendant did not really purchase or sell any stocks except as set forth in this affidavit. In many instances where customers had previously given orders to purchase stock upon margin they subsequently gave orders to deliver to them the stock previously ordered on margin, and the defendant purchased the stock at prices existing at the time of the delivery and charged them to the customers at the prices existing at the time of the original orders. In many instances this resulted in a charge for the stock at double the cost of the stock at the time of the actual purchase.

The defendant did not have loans on its stocks, but charged interest on the difference between the margin and the alleged purchase price of the stocks, except in a few instances.

J. M. WARWICK.

Sworn to before me this 9th day of May, 1905.

J. ALBERT WOOD,
Commissioner of Deeds in and for City of New York.

(Endorsed:) Circuit Court of the United States, Southern District of New York. Ridgway Bowker *vs.* Haight and Freese Company. Affidavits and order appointing receiver. William P. Maloney, attorney for plaintiff, 41 Wall street, Borough of Manhattan, New York. U. S. Circuit Court, filed May 9, 1905. Southern District, New York, John A. Shields, Clerk.

40 At a Stated Term of the Circuit Court of the United States for the Southern District of New York held at the General Post Office, in the City, County and State of New York, on the 10th day of May, 1905.

Present: Hon. E. Henry Lacombe, United States Circuit Judge.

RIDGWAY BOWKER, Plaintiff,
against
HAIGHT AND FREESE COMPANY, SEABOARD NATIONAL BANK, CONSOLIDATED NATIONAL BANK, PRODUCE EXCHANGE SAFE DEPOSIT AND STORAGE COMPANY, JOHN DOE and RICHARD ROE, Defendants.

In Equity.

On reading and filing the bill in equity herein sworn to May 9th, 1905, and the affidavits of Ridgway Bowker and John M. Warwick, sworn to May 9th, 1905, and the affidavit of Arthur M. Johnson, sworn to May 8th, 1905, and on reading and filing a certified copy of the decree of the Circuit Court of the United States for the District of Massachusetts, appointing James D. Colt receiver of the above named defendant, Haight and Freese Company, and it ap-

41 pearing that the said receiver has qualified in said Circuit Court of the United States for the District of Massachusetts, and the court and the undersigned have heretofore made an order, dated May 9th, 1905, appointing James D. Colt of Boston, Massachusetts, and Walter D. Edmonds of New York City, receivers of the assets and property of the Haight and Freese Company within the State of New York, which said order was duly filed in this Court May 9th, 1905, with the said bill in equity, and the said Walter D. Edmonds having duly qualified as receiver under said order, and taken possession of the assets of the said defendant, Haight and Freese Company, and said order having been duly served on the defendant, Haight and Freese Company, and said defendant having appeared herein by Franklin Bien, its solicitor, and moved to vacate the said order of May 9th, 1905, on the ground that the said order was inadvertently granted, and among other grounds that the court was without jurisdiction, and in case said application was refused that the order granting the injunction and appointing the receivers

be vacated, and the defendant, Haight and Freese Company, be permitted to continue its business by depositing with the clerk such amount in cash as the court may seem fit to direct, or filing a surety company undertaking in such amount as the court may fix, and for such other and further relief as may be just and proper, and said motion having duly come on to be heard May 10th, 1905, at 1.30 o'clock in the afternoon, before the court and the under-
42 signed, at an equity Term of the United States Circuit Court, held at the General Post Office Building, in the County, City and State of New York, and Walter D. Edmonds aforesaid being ill, and having asked leave of the Court to resign, owing to illness, and that a substitute be appointed to act as receiver with the said James D. Colt, and the court having granted leave to said receiver to resign upon the qualification of his successor.

Now, on motion of William P. Maloney, Esq., solicitor for the complainant, and Roger Foster, Esq., counsel for James D. Colt, said receiver appointed as aforesaid by the Circuit Court of the District of Massachusetts as aforesaid, of the defendant Haight and Freese Company, appearing on behalf of the said receiver James D. Colt, and admitting and confessing the allegations in said bill, and consenting to the order and decree aforesaid, and to this order on behalf of said defendant, Haight and Freese Company, and the said Roger Foster, Esq., of counsel for said receiver aforesaid, and as counsel for said Walter D. Edmonds, also as such receiver, having appeared on said motion to vacate the said receivership as aforesaid, it is

Ordered, and I hereby order that the motion so made by defendant, Haight and Freese Company, by its said solicitor aforesaid, be and it is hereby denied with leave to renew should the order in the Massachusetts District be vacated, and it is

43 Ordered that the application of said Walter D. Edmonds as such receiver to resign be and the same hereby is granted upon the qualification of his successor, and Beverley Randolph Robinson, Esq., of 49 Wall Street, New York City, be and he hereby is appointed receiver with the said James D. Colt aforesaid, in the place and stead of the said Walter D. Edmonds, upon the said Beverley Randolph Robinson filing a bond in the sum of Ten thousand dollars ($10,000.) in this court, as hereinafter set forth; and the bond of the United States Fidelity and Guaranty Company of Baltimore for Ten thousand dollars ($10,000.) heretofore filed herein in this court by the said Walter D. Edmonds, on May 9th, 1905, be and the same hereby is cancelled and discharged upon the qualification of said Beverley Randolph Robinson, and it is

Ordered, adjudged and decreed, and I hereby order that James D. Colt, of Boston, Massachusetts, and Beverley Randolph Robinson, of 49 Wall Street, New York City be and they hereby are appointed receivers (both original and as ancillary to said decree of the Circuit Court of the United States for the District of Massachusetts) of all the property and assets of defendant Haight & Freese Co. within this district, to receive, collect, and take possession of all the property of said defendant Haight and Freese Company including all the

assets, choses in action, accounts, books of account, correspondence, papers and memoranda, whether in possession of the said defendant, Haight and Freese Company, or of any other person acting
44 in behalf of said defendant within said district, and hold the same awaiting the further order of this court, provided that said receivers shall take no action until they shall file a bond in the sum of Ten thousand dollars ($10,000.) in this court, conditioned for the faithful performance of their duties as such receivers, with good and sufficient surety, and that as soon as they shall collect funds or assets of said defendant, Haight and Freese Company, they shall report the amount thereof from time to time to this Court, in order that the amount of such may be increased if necessary, and it is hereby

Ordered, adjudged and decreed, and I hereby order that the said defendant, Haight and Freese Company, its officers, agents, servants and assigns, and the Seaboard National Bank, the Consolidated National Bank, the Produce Exchange Safe Deposit and Storage Company, John Doe and Richard Roe, and all other persons and corporations that may have in their possession and control and property, effects or credits belonging to the said Haight and Freese Company, or standing in its name or in the name of William H. Lillis, George G. Turner, Harvey Watson, Charles B. Poor, Junior, William G. Conkling, — Beardsley, either as officers of said defendant, or individually, be and they hereby are enjoined and restrained and stayed until the further order of this court from paying over or transferring any of said money, property, effects, or assets to any person other than said receiver, and from permitting any person other than said receiver to remove the contents of any safe deposit com-
45 pany box or vault, or bank, standing in the name of said defendant, Haight and Freese Company, or in the names of either of the officers or employees of the said above mentioned Haight and Freese Company, or either of the above named persons, and they and each of them are hereby directed to deliver up the same to the said receivers forthwith, and it is

Further ordered that either of said receivers may take possession upon his qualification without waiting for the qualifications of the other; and that no funds be removed from the jurisdiction of this court, except upon a further order of the court, and I hereby

Further order that the said defendants and each of them show cause before me or such Judge of this Court as may then be holding the motion calendar, on the 12th day of May, 1905, at eleven o'clock A. M., or at such other hour as said motion calendar may be called on said day, at the Court House of the Circuit Court of the United States for the Southern District of New York, in the General Post Office, County of New York, Borough of Manhattan, City and State of New York, why a writ of permanent injunction should not issue in accordance with the terms of this order, and why the said receivership should not be made permanent and why the complainant should not have such other and further relief as to the Court may seem just, and it is

Further ordered that the service of the order of May 9th, 1905,

heretofore made herein shall stand and be deemed good and sufficient service without reserve of this order, and the defendants
46 and each of them not heretofore served with the said order of May 9th, 1905, may be served with this order on or before May 11th, 1905.

And sufficient cause appearing, service of the said order of May 9th, 1905, aforesaid, or of this order and such other affidavits as may be served twenty-four hours before said return day shall be sufficient service thereof.

E. HENRY LACOMBE,
Judge U. S. Circuit Court.

(Endorsed:) Circuit Court of the United States, Southern District of New York. Ridgway Bowker, plaintiff, against Haight & Freese Company and others, defendants. Order appointing receiver. William P. Maloney, attorney for plaintiff, 41 Wall Street, Borough of Manhattan, New York. U. S. Circuit Court, filed May 11, 1905, Southern District New York, John A. Shields, Clerk.

47 In the Circuit Court of the United States for the Southern District of New York.

RIDGWAY BOWKER, Complainant,
against
HAIGHT AND FREESE COMPANY ET AL., Defendants.

Upon the annexed petition of the receivers of the defendant Haight and Freese Company, the affidavit of Beverly R. Robinson, one of the said receivers, verified the 21st day of June, 1905, and the affidavit of William P. Maloney, verified the 21st day of June, 1905, let Franklien Bien show cause before this court at a Stated Term for the hearing of motions, to be held at the United States Court House in the Borough of Manhattan, City of New York, on the 23rd day of June, 1905, at one o'clock in the *a*forenoon of that day, or as soon thereafter as counsel can be heard, why an order should not be made directing and requiring the said Franklin Bien to pay and deliver to said James D. Colt and Beverley R. Robinson, as receivers of the property of the defendant Haight and Freese Company the sum of Two thousand dollars proceeds of a certain check or draft mentioned in the said petition, together with interest thereon, and why the said receivers should not have the relief
48 prayed for in the said petition, and such other and further relief as to the court may seem just and equitable. And I hereby direct, that service of this order together with copies of the papers upon which the same is granted on or before the 21 day of June, 1905, shall be good and sufficient service.

GEO. C. HOLT, *J.*

Dated New York June 21st, 1905.

49 In the Circuit Court of the United States for the Southern District of New York.

RIDGWAY BOWKER, Complainant,
against
HAIGHT AND FREESE COMPANY ET AL., Defendants.

To the Honorable the Judges of the Circuit Court of the United States for the Southern District of New York:

The petition of James D. Colt and Beverley R. Robinson, as receivers of the property of the defendant Haight and Freese Company respectfully shows:

First. Upon information and belief that by an order of the United States Circuit Court for the District of Massachusetts, made on the 8th day of May, 1905, James D. Colt was appointed temporary receiver of the assets of the above named defendant Haight and Freese Company, for the District of Massachusetts. At about eleven o'clock on the morning of the 9th day of May, 1905, he took possession of the office of the defendant in the City of Boston, in the said District of Massachusetts; and that within a short time after the said hour, the news of his appointment was sent by ticker to the offices of stockbrokers throughout the United States and
50 to the offices of the defendant Haight and Freese Company in the Southern District of New York.

Second. Upon information and belief that on the 9th day of May, 1905, by an order of this court made and entered in this cause, and filed in the office of the clerk of this court, the said James D. Colt and Walter D. Edmonds, of the City of New York, were appointed temporary receivers of the property of the defendant Haight and Freese Company in the Southern District of New York, and that the said Walter D. Edmonds duly qualified as such receiver on the said day and entered upon the discharge of his duties with the powers conferred upon him by the said order. Thereafter, and at about four o'clock in the afternoon of the said day, the said Walter D. Edmonds, as such receiver, went to the office of the defendant Haight and Freese Company at No. 53 Broadway, in the city of New York, and then and there a certified copy of the said order was served by William P. Maloney, upon Harvey Watson, the Secretary and a director of the defendant Haight and Freese Company, and the said receiver then demanded of the said Watson that he deliver to the said receiver all the property and assets of the defendant Haight and Freese Company.

Third. On the 10th day of May, 1905, the said Walter D. Edmonds, resigned as receiver of the defendant Haight and Freese Company, and by order of this court made in this cause, Beverley R. Robinson was appointed co-receiver with the said James
51 D. Colt, in the place and stead of the said Edmonds, and duly qualified as such receiver. Said order was filed in the office of the clerk of this court on the 11th day of May, 1905.

Fourth. Upon information and belief that among the assets of the defendant Haight and Freese Company in the Southern District of New York, on the 9th day of May, 1905, was a sum of money on deposit to the credit of the defendant Haight and Freese Company with the Colonial Bank of the City of New York.

Fifth. Upon information and belief, that on the 9th day of May, 1905, and after the said Harvey Watson, the secretary and Manager of the defendant Haight and Freese Company had notice of the appointment of the said receiver Colt in the District of Massachusetts, the said Harvey Watson, delivered to Franklin Bien, a member of the Bar of this court, as a retainer, and for the purpose of paying in advance for services to be rendered by the said Bien, as solicitor for the defendant in this cause, a certain check or draft, drawn by the defendant Haight and Freese Company upon the Colonial Bank of the City of New York dated May 9th, 1905, for Two thousand dollars, payable to the order of "Harvey Watson Mgr." and endorsed "pay to the order of Franklin Bien on account of retainer Harvey Watson Mgr."

Sixth. Upon information and belief that on the 10th day of May, 1905, and after the making and entry of the order appoint-
52 ing the receivers in this cause, and with notice of the said order and the injunction therein contained, the said Franklin Bien procured the said check or draft to be certified by the Colonial Bank, and thereafter procured the same to be paid.

Seventh. That your petitioner Robinson, as receiver of the property of the defendant Haight and Freese Company has made a demand upon the said Bien, that he pay over and deliver to the receivers the sum of Two thousand dollars the proceeds of the said check or draft, which the said Bien has refused to do.

Wherefore, your petitioners pray for an order directing the said Franklin Bien to pay over to your petitioners the sum of Two thousand dollars, the proceeds of the said check or draft with interest from the 10th day of May, 1905, and for such other and further relief as to the court may seem just.

Dated New York, June 21st, 1905.

BEVERLEY R. ROBINSON, *Receiver.*

FREDERICK J. MOSES,
Solicitor for Receiver Robinson.
ROGER FOSTER,
Solicitor for Receiver Colt, 35 Wall Street, New York.

53 STATE OF NEW YORK, *County of New York, ss:*

Beverley R. Robinson, being duly sworn says, I am one of the receivers of the property of the defendant Haight and Freese Company; I have read the foregoing petition and know the contents thereof and the same is true to my own knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters I believe it to be true.

BEVERLEY R. ROBINSON.

Sworn to before me this 21st day of June, 1905.
[SEAL.] E. THEO. I. THYGERSON,
Notary Public, Kings County.

Certificate filed in New York County.

54 In the Circuit Court of the United States for the Southern District of New York.

RIDGWAY BOWKER, Complainant,
against
HAIGHT AND FREESE COMPANY ET AL., Defendants.

CITY AND COUNTY OF NEW YORK, *ss:*

Beverley R. Robinson, being duly sworn says, I am one of the receivers of the property of the defendant Haight and Freese Company heretofore appointed by this court, and have duly qualified as such receiver.

Among the assets of the defendant Haight and Freese Company which have come into the possession of the receiver was a small balance of money, which was on deposit to the credit of the defendant Haight and Freese Company with the Colonial Bank in the City of New York.

In the course of the performance of my duties as receiver, I procured from the Colonial Bank cancelled checks which had been paid by the Colonial Bank for the account of the Haight and Freese Company, among them I found a check or draft No. 1055, dated May 9th, 1905, drawn to the order of "Harvey Watson Mgr." for Two thousand dollars and signed "Haight and Freese Co., W. H. Lillis, treasurer." The check is endorsed "Pay to the order
55 of Franklin Bien on account of retainer Harvey Watson Mgr." It is also endorsed "Franklin Bien" with another name which is illegible, but which appears to read "William Donnelly." Is also endorsed with a rubber stamp "Pay to the Nassau Bank New York or order Charles Frazier & Co." It is also endorsed with a rubber stamp "Received payment through New York Clearing House May 10, 1905, the Nassau Bank No. 40." Check is also stamped on front "Certified payable only through N. Y. Clearing House May 10, 1905, the Colonial Bank, 66th Street Branch" and over the impression of the said rubber stamp is written a name which is illegible and the word "Teller."

I caused inquiry to be made at the Colonial Bank and was informed that this check or draft was certified by it on May 10th, 1905.

Among the papers of the defendant Haight and Freese Company which have come into possession of the receivers are a large number of checks payable to the order of Harvey Watson Mgr. and signed in blank "Haight and Freese Company, W. H. Lillis, treas.," and I have been informed and believe, that all or nearly all the moneys which were disbursed in the conduct of the business of the defend-

ant at its New York office were paid by checks similar to the one in question, the said Watson, the secretary of the defendant company, and the manager of its New York office, fill- in one of these checks with the date and the amount to be paid and, by endorse-
56 ment, making the check payable to the person to whom the money was to be paid.

BEVERLEY R. ROBINSON.

Sworn to before me this 21st day of June, 1905.
[SEAL.] E. THEO. I. THYGERSON,
Notary Public, Kings County.

Certificate filed in New York County.

57 In the Circuit Court of the United States for the Southern District of New York.

RIDGWAY BOWKER, Complainant,
against
HAIGHT AND FREESE COMPANY ET AL., Defendants.

STATE OF NEW YORK, *County of New York, ss:*

William P. Maloney, being duly sworn deposes and says;

I am the solicitor for the complainant, Ridgway Bowker, in the above entitled suit in Equity; on the 8th day of May, 1905, an order was duly entered in the Circuit Court of the United States for the District of Massachusetts, appointing James D. Colt receiver of the property of the defendant Haight and Freese Company.

Said receiver took possession of the office and property of that corporation in Boston, Massachusetts, at about eleven o'clock in the morning of the next day, May 9th, and the news of his appointment was sent by ticker to the offices of the principal stockbrokers throughout the United States and to the offices of the defendant Haight and Freese Company in the City, County and State of New York,
58 as I was informed by defendant's employees.

On the 9th day of May, 1905, an order was duly entered and filed herein, signed by Hon. E. Henry Lacombe, United States Circuit Judge, which order appointed James D. Colt, of Massachusetts, and Walter D. Edmonds, of New York, receivers, to collect, receive and take possession of all the property of the defendant Haight and Freese Company, whether in possession of said defendant or in the possession of any other person acting on behalf of said defendant, and to hold the same to await the order of this court, provided that said receivers should take no action until they have filed a bond in the sum of Ten thousand dollars ($10,000). Said order further provided that either of said receivers may take possession upon his qualification without waiting for the qualification of the other. The said Edmonds duly qualified as such receiver by filing a bond as prescribed in said order on the same day, which bond was immediately approved by this court. Thereupon at four o'clock in

the afternoon of that day he went with me to the office of the said Haight and Freese Company. I then and there served a certified copy of said order upon Harvey Watson, who is secretary and a director of said defendant Haight and Freese Company, and then said receiver in my presence demanded of said Watson that he deliver to him all the property and assets of said corporation. The said Watson thereupon left the office.

Said order of May 9th, 1905, was amended by another order of this court, signed May 10th, and entered and filed May 11th,
59 1905, by which the resignation of said Edmonds was accepted and Beverley R. Robinson was appointed receiver in his place.

WM. P. MALONEY.

Sworn to before me this 21st day of June, 1905.

[SEAL.] WILSON R. YARD,
Notary Public, Westchester County.

Cert. filed in N. Y. Co.

(Endorsed:) In the Circuit Court of the United States for the Southern District of New York. Ridgway Bowker, complainant, against Haight & Freese Company, defendants. Order to show cause and motion papers. Frederick J. Moses, attorney for Receiver, 32 Liberty Street, New York City. A copy received, N. Y., June 21st, 1905. Frankin Bien. U. S. Circuit Court, filed May 26, 1906. Southern District New York. John A. Shields, Clerk.

60 In the Circuit Court of the United States for the Southern District of New York.

RIDGWAY BOWKER, Complainant,
against
HAIGHT AND FREESE COMPANY ET AL., Defendants.

SIR: Please take notice that an affidavit of which the annexed is a copy will be submitted to the court in support of the motion to compel Franklin Bien to pay over to the receivers the proceeds of a check for $2,000 received by him from the Haight and Freese Company, which motion has been adjourned to March 30, 1906.

Dated New York, March 24, 1906.

Yours, &c., FREDERICK J. MOSES,
Solicitor for Receiver Robinson.

Office and postoffice address, 32 Liberty Street, Borough of Manhattan, City of New York.

To Franklin Bien, Esq., Attorney for defendant Company, Roger Foster, Esq., Solicitor for receiver Colt.

61 In the Circuit Court of the United States for the Southern District of New York.

RIDGWAY BOWKER, Complainant,
against
HAIGHT AND FREESE COMPANY ET AL., Defendants.

Affidavit.

COMMONWEALTH OF MASSACHUSETTS, *County of Suffolk, ss:*

James D. Colt, being duly sworn says:

I am one of the receivers of the defendant the Haight & Freese Company, duly appointed as such by the Circuit Court of the United States for the Southern District of New York. On the 12th day of May last past, while in company with my counsel, Roger Foster, Esq., I met and talked with Franklin Bien, Esq., who represented himself to be an attorney for said defendant company. The said conversation took place in the hallway of the Postoffice Building in New York City, in close proximity to the entrance to the court-room of the United States Circuit Court, and in the course of said conversation, Mr. Foster demanded of Mr. Bien, as the representative of said company, that all certified checks drawn against funds of the said company, and then in the possession of its officers and agents, should be turned over to the receivers of the com-
62 pany. Mr. Bien replied, stating that there was one check for $2,000. paid to him as a retainer which they (meaning the Receivers) would not get, and, when he was making this statement, he struck the breast pocket of his coat with his hand to indicate that such check was at that time in his possession. Mr. Foster then said that he did not feel so sure of that.

JAMES D. COLT.

COMMONWEALTH OF MASSACHUSETTS, *County of Suffolk, ss:*

Boston, September 21, 1905. Then personally appeared James D. Colt, known to me to be the person who signed the foregoing affidavit, and made oath that the statements therein contained are true.

Before me,
[SEAL.]

BENJ. E. BATES,
Notary Public.

(Endorsed:) In the Circuit Court of the U. S. For the Southern District of N. Y. Ridgway Bowker, complainant, against Haight and Freese Company, *et al.*, defendants. Notice and affidavit of James D. Colt. Moses, Morris & Westervelt, attorneys for receiver, 32 Liberty Street, Borough of Manhattan, New York City. U. S. Circuit Court. Filed May 26, 1906. Southern District New York. John A. Shields, Clerk.

63 United States Circuit Court for the Southern District of New York.

RIDGWAY BOWKER
against
HAIGHT & FREESE COMPANY ET AL.

UNITED STATES OF AMERICA, *Southern District of New York, ss:*

Franklin Bien, being duly sworn, deposes and says: I am the attorney for the defendant corporation and was retained some time in the morning of May 9th, 1905, by Albert I. Sire, an attorney and counsel, and also counsel for defendant corporation, Haight & Freese Co. I was informed that a receiver had been appointed by Haight & Freese Company, *ex parte* and without notice, in the United States Circuit Court, for the District of Massachusetts, in an action instituted by one Anna L. H. Weiss against said corporation. I was also informed the Seaboard National Bank, (where the defendant corporation deposited its funds within this jurisdiction) received a communication not to honor the checks of the defendant drawn on said bank. If I am not mistaken, I believe the bank received such notice from Roger Foster, counsel for the Boston receiver in this jurisdiction.

I communicated with Parker & Aaron, Esqs., counsel for
64 the Seaboard National Bank, and had a conversation with Mr. Parker over the telephone, in which he admitted notice had been received by the bank and they would not honor any checks. I asked him whether any other receivership or injunction had been served upon the bank in this jurisdiction, and he replied there had not but understood there would be.

I was requested by Mr. Sire to prepare to go to the city of Boston, Massachusetts, as counsel for the defendant, for the purpose of consulting with I. R. Clark, Esq., the Boston counsel for Haight & Freese Company and to act generally in connection with this litigation.

I met Mr. Harvey Watson, secretary of Haight & Freese Company, at the office of Albert I. Sire, 99 Nassau Street, Manhattan Borough, City of New York, and in the presence of Mr. Sire and Mr. Bennett E. Siegelstein (who is also an attorney and has his office with Mr. Sire), I informed Mr. Watson and Mr. Sire, I would require a retainer of Two thousand dollars as counsel for defendant for the purpose of going to Boston to make the examination and take such proceedings as might be necessary. I asked Mr. Watson if he had been served with any papers showing the appointment of any receiver in this jurisdiction, or any injunction, and he replied no papers of any kind had been served and he knew of none.

65 Thereupon Mr. Sire requested Mr. Siegelstein to go to the clerk's office of this court to ascertain if any proceedings had been instituted, any ancillary receiver had been appointed

or otherwise. He was absent for some time and on his return informed Mr. Sire (in the presence of Mr. Watson and myself) that no papers had been filed or proceedings instituted against defendant corporation so far as the records showed, no ancillary receiver had been reported in this jurisdiction and there was nothing of record against defendant corporation.

I then accepted the check drawn by Mr. Watson and prepared to arrange my matters so I could leave for Boston, and take such proceedings there as might be necessary to protect defendant.

Several hours after that I was informed a suit had been filed in this jurisdiction by Ridgway Bowker, the complainant herein, and an ancillary receiver appointed. The papers were turned over to me, and since that time I have acted as counsel for defendant corporation, making numerous trips to Boston, attending numerous motions here, hearings before Special Master, attendance in Philadelphia for consultation in reference to suit instituted in that jurisdiction by this complaint and where ancillary receiver was also appointed.

66 The sum of Two thousand dollars was an insignificant amount for the services rendered by me for defendant corporation in the litigation in the various jurisdictions aforesaid.

At the time I received the Two thousand dollars from the defendant corporation, no suit had been instituted in this jurisdiction, receiver appointed or injunction issued, so far as I could ascertain. I was very particular to ascertain this fact before accepting said check, and there was no obstacle in the way of my receiving it.

I further state, with all due respect to this Honorable Court, the Court is without jurisdiction in the appointment of the receivers herein, in that, as I understand, they were appointed *ex parte* upon the papers in the Weiss case in Boston,—this Court acting upon the decree in that case and claiming the right (as in proper cases) to appoint ancillary receiver in this jurisdiction. As appears upon the face of the Bill of Complaint, we contend that the United States Circuit Court, for the District of Massachusetts, never had any jurisdiction and now has no jurisdiction, in that the alleged claim of the diversity of citizenship is not well founded. We claim that Anna L. H. Weiss, the complainant in that action, as well as the defendant corporation being citizens of Massachusetts for the purpose of litigation, the Court has no jurisdiction. If such fact is well founded, then, of course, the order made by this

67 Honorable Court will necessarily have to be vacated and set aside, as soon as the order in the Boston case appointing receiver is set aside.

I further state, this is an attempt to deprive me of property which I have lawfully acquired, as I maintain, and I demand my constitutional right of trial by jury, in that the receivers can institute an action against me for the recovery of said property as money had and received, or such other cause as they might select, in which action I can interpose an answer and have my day in court with

a trial by jury, as guaranteed to me by the Constitution of the United States.

I therefore respectfully submit and ask that this motion be denied.

FRANKLIN BIEN.

Subscribed and sworn to before me, this 7th day of March, 1906.
[SEAL.] THOMAS ADAMS,
Notary Public, N. Y. Co.

68 United States Circuit Court for the Southern District of New York.

RIDGWAY BOWKER
against
HAIGHT & FREESE COMPANY ET AL.

UNITED STATES OF AMERICA, *Southern District of New York, ss:*

Albert I. Sire, being duly sworn, deposes and says: I am an attorney and counsellor at law, and admitted to practice in this court. I have my offices at 99 Nassau street, Manhattan Borough, New York City.

Prior to the institution of this action, I was counsel for Haight & Freese Company.

On the morning of May 9th, 1905, I was informed that an action had been instituted in the United States Circuit Court for the District of Massachusetts, by Anna L. H. Weiss against Haight & Freese Company, and that an order or decree had been *ex parte*, without notice to anyone, by which a receiver of the property of defendant corporation was appointed in that jurisdiction. After receiving such information I communicated with my clients and sent for Mr. Franklin Bien and retained him as counsel for the defendant corporation for the purpose of proceeding to Boston to take such
69 proceedings as might be necessary to relieve said corporation from the effect of the receivership, among other grounds, that no notice had been given said defendant corporation.

I was also informed by the officers of the defendant corporation a notice had been sent by someone to the Seaboard National Bank, (where said defendant corporation had a large amount of money on deposit) not to pay out any moneys, that a foreign receiver had been appointed and one would be appointed in this jurisdiction.

During the consultation with Mr. Bien, we rang up the counsel for said bank, Parker & Aaron, Esqrs., and Mr. Bien spoke to Mr. Parker; in Mr. Bien's affidavit he sets forth in substance the conversation he had with Mr. Parker, which I heard, and Mr. Parker's answers, which he repeated to me at the time, and the same is correctly set forth in said affidavit.

Mr. Bien requested a retainer of Two thousand dollors, and I sent for Mr. Harvey Watson, secretary of defendant corporation, informed him of such fact and advised him to pay the same. Be-

fore accepting any check, Mr. Bien requested me to send Mr. Bennett E. Siegelstein, (who has an office with me and is an attorney and counsellor at law) to the office of the clerk of this Court to ascertain whether any action had been instituted, injunction issued against, or receiver appointed of defendant corporation. Mr. Siegelstein went to the Clerk's office and on his return reported to me
70 (in the presence of Messrs. Bien and Watson), that he had examined the records, made an inquiry of the Clerk, in charge, and found no suit had been instituted, receiver appointed, or injunction issued, or anything else.

Thereupon I directed Mr. Watson to make out a check to the order of Mr. Bien for Two thousand dollars, and instructed Mr. Bien to get ready to proceed to Boston for the purpose of protecting the interests of defendant corporation.

It was several hours after this, I was informed that an ancillary receiver had been appointed and injunction issued in an action instituted by the complainant herein which papers were turned over to Mr. Franklin Bien, — was counsel for Haight & Freese Company, and who has acted as defendant's counsel ever since.

ALBERT I. SIRE.

Subscribed and sworn to before me this 8th day of March, 1906.
[SEAL.] WILLIAM F. DONNELLY,
Notary Public New York County.

71 United States Circuit Court for the Southern District of New York.

RIDGWAY BOWKER
against
HAIGHT & FREESE COMPANY ET AL.

UNITED STATES OF AMERICA, *Southern District of New York, ss:*

Harvey Watson, being duly sworn deposes and says: I was secretatary of the corporation of Haight & Freese Company, one of the defendants herein.

On the morning of May 9th, 1905, I was informed a receiver of the property of Haight & Freese Company had been appointed in proceedings instituted in Boston, Massachusetts, and was in possession of its property. The Seaboard National Bank, where we had a large amount on deposit, also notified me they had received notice to pay no checks drawn by defendant corporation upon the funds deposited in said bank. I immediately consulted Mr. Albert I. Sire, one of the counsel for Haight & Freese Company, and he advised the retainer of Mr. Franklin Bien and requested me to call at his office. I called at Mr. Sire's office, where I was introduced to Mr. Bien, whom I met for the first time. There was a conference between Albert I. Sire, Franklin Bien and myself, during
72 which Mr. Sire stated it would be necessary for Mr. Bien to proceed to Boston and take such proceedings as might be nec-

essary to protect the interests of defendant corporation. Mr. Bien asked for a retainer of Two thousand dollars, which Mr. Sire stated was a reasonable amount to be paid.

I thereupon stated, acting under Mr. Sire's advice, I would give a check for the retainer, but Mr. Bien said, before accepting the same he desired to be sure that no ancillary receiver of the Haight & Freese Company had been appointed in this jurisdiction, or injunction issued, which would prevent his receiving the same.

Mr. Sire requested Mr. Bennett E. Siegelstein to examine the records to ascertain such fact, and Mr. Siegelstein reported no proceedings had been instituted, receiver appointed or injunction issued, as more fully appears by his affidavit, which I have read and is correct.

Thereupon I gave Mr. Bien a check to his order for Two thousand dollars.

Several hours thereafter I first ascertained that this action had been instituted, and was served with papers, which at the request of Albert I. Sire, I turned over to Franklin Bien, general counsel for defendant.

After the appointment of the ancillary receiver, I turned
73 over all the assets in my possession and under my control to Mr. Colt, receiver appointed in Boston and who had been appointed ancillary receiver in this jurisdiction, acting under the advice of Mr. Bien, counsel for defendant corporation.

There was no intention to prevent the receiver obtaining possession of any property of defendant corporation in this jurisdiction. The money was paid to Mr. Bien in good faith before any receiver was appointed in this jurisdiction or injunction issued, and was paid for the purposes aforesaid.

HARVEY WATSON.

Subscribed and sworn to before me, this 14 day of March, 1906.
[SEAL.] WILLIAM F. DONNELLY,
Notary Public, N. Y. Co.

74 United States Circuit Court for the Southern District of New York.

RIDGWAY BOWKER
against
HAIGHT & FREESE COMPANY ET AL.

UNITED STATES OF AMERICA, *Southern District of New York, ss:*

Bennett E. Siegelstein, being duly sworn, deposes and says: I am an attorney and counsellor at law, admitted to practice in this Court, and have my office with Mr. Albert I. Sire, at 99 Nassau street, Manhattan Borough, New York City.

On the morning of May 9th, 1905, I was called to the office of Mr. Albert I. Sire, where he was in consultation with Mr. Franklin Bien and Mr. Harvey Watson, in relation to the affairs of Haight & Freese Company. Mr. Sire stated a receiver had been appointed of the

property of said company in Boston, and he wished me to go to the Clerk's office of this Court to ascertain whether any action or proceeding had been instituted against Haight & Freese Company in this jurisdiction, a receiver or ancillary receiver appointed, or injunction issued.

I went to the office of the Clerk of this Court, saw the clerk
75 in charge, examined the books and records so far as I could, and found no proceedings had been instituted, receiver appointed, or injunction issued, and upon inquiry of the clerk, he informed me he knew of no proceedings against Haight & Freese Company.

Thereupon I returned to the office and reported the result of my investigations to Mr. Albert I. Sire in the presence of the persons hereinbefore mentioned. Mr. Bien thereupon received a check for Two thousand dollars from Mr. Harvey Watson, as his retainer in the Haight & Freese matter.

BENNETT E. SIEGELSTEIN.

Subscribed and sworn to before me, this 8th day of March, 1906.
[SEAL.] WILLIAM F. DONNELLY,
Notary Public, N. Y. Co.

(Endorsed:) U. S. Circuit Court, Southern District of N. Y. Ridgway Bowker against Haight & Freese Co., *et al.* Affidavits opposing motion to pay over. Franklin Bien, attorney for deft. company and respondent, 5 Beekman street, New York City. U. S. Circuit Court, filed May 26, 1906, Southern District, New York, John A. Shields, Clerk.

76 United States Circuit Court, Southern District of New York.

RIDGWAY BOWKER
against
HAIGHT & FREESE COMPANY ET AL.

UNITED STATES OF AMERICA,
Southern District of New York, County of New York, ss:

Franklin Bien, being duly sworn, deposes and says: I have read with great surprise the affidavit made by James D. Colt, receiver appointed by the United States Circuit Court for the District of Massachusetts, in the case of Anna L. H. Weiss as complainant, against defendant corporation, upon which decree of appointment this Honorable Court appointed Beverley R. Robinson and James D. Colt, ancillary receivers herein. That the statement contained in said affidavit, "Mr. Bien replied, stating that there was one such check for $2,000. &c., which they (meaning the receivers) would not get, and, when he was making this statement, he struck the breast pocket of his coat with his hand to indicate that such check was at that time in his possession."

Said statement is absolutely false and untrue. I further state to

prove such fact, that said check was delivered to me on May 9th, 1905, and on the morning of May 10th, 1905, I had the same certified, endorsed it and delivered the same to William F. Donnelly to have in cashed in his bank, which he did and delivered the cash to me, as I was about leaving for Boston in connection with this matter and did not know how long I would be gone.

77 That Mr. Donnelly cashed said check and handed me the cash before 1 P. M. of May 10th, 1905. His affidavit is hereto annexed.

FRANKLIN BIEN.

Subscribed and sworn to before me this 28th day of March, 1906.

[SEAL.] THOMAS ADAM,
Notary Public, N. Y. Co.

78 United States Circuit Court for the Southern District of New York.

RIDGWAY BOWKER
against
HAIGHT & FREESE COMPANY ET AL.

UNITED STATES OF AMERICA,
Southern District of New York, County of New York, ss:

William F. Donnelly, being duly sworn, deposes and says:

I have an office at 93 Nassau Street, Borough of Manhattan, City of New York.

On May 10th, 1905, I received from Mr. Franklin Bien (with whom I am well acquainted) a check drawn by Haight & Freese Company, to his order for $2,000. dated May 9th, 1905, and drawn on the Broadway branch of the Colonial Bank in this City, with a statement that he had endorsed the same, and he requested me to cash it at my bank, as he was about leaving for Boston in the Haight & Freese matter and did not know how long he would be gone.

Thereupon I endorsed said check and had it cashed before 1 P. M. May 10th, 1905, at the banking house of Charles Frazier & Co., which is in the same building as my office. I handed the cash for said check of $2,000. to Mr. Bien before 1 P. M. on May 10th, 1905.

WILLIAM F. DONNELLY.

Subscribed and sworn to before me, this 28th day of March, 1906.

[SEAL.] THOMAS ADAM,
Notary Public, N. Y. Co.

79 United States Circuit Court for the Southern District of New York

RIDGWAY BOWKER
against
HAIGHT & FREESE COMPANY ET AL.

UNITED STATES OF AMERICA,
Southern District of New York, County of New York, ss:

R. F. Fuller, being duly sworn, deposes and says: I am Manager of the Colonial Bank, Broadway Branch, situated at 1960 Broadway, Borough of Manhattan, City of New York.

The corporation of Haight & Freese Company kept an account in this bank prior to May 10th, 1905. From the records on our books, it appears on the morning of May 10th, 1905, at the request of the person presenting a check signed by Haight & Freese Company to the order of Franklin Bien, dated May 9th, 1905, for Two Thousand Dollars, we duly certified such check and charged it against the amount on deposit to the credit of Haight & Freese Company. This check was returned to us through the Clearing House, on May 11th, 1905, and we cancelled the same as a voucher. Said check so returned was in our possession from May 11th 1905, to May 16/05 when said check was delivered by us to Beverly R. Robinson, Receiver.

R. F. FULLER.

Subscribed and sworn to before me, this 28th day of March, 1906.
GEORGE S. CARR,
Notary Public, N. Y. Co. (20).

(Endorsed:) U. S. Circuit Court, Southern District of New York—Ridgway Bowker against Haight & Freese Company *et al.*—Replying affidavits on motion to pay over.—Franklin Bien, Attorney for Defendant Company and Respondent, 5 Beekman St. New York City.—U. S. Circuit Court, Southern District New York, Filed May 26, 1906, John A. Shields, Clerk.

80 United States Circuit Court, Southern District of New York.

RIDGWAY BOWKER
against
HAIGHT & FREESE COMPANY ET AL.

This is a motion made by the receivers to compel Mr. Franklin Bien to pay over to them the sum of $2,000.

LACOMBE, *Circuit Judge:*

There is no dispute as to the facts and the conclusion to be drawn from such facts is abundantly settled by authority.

The Haight & Freese Company was a corporation with which prior

to May 9th 1905 Mr. Bien apparently had no business relations. It was a New York corporation had its principal office and transacted business here, and had a branch office in Boston. On May 8th, 1905 the U. S. Circuit Court in Massachusetts in an action brought in that court appointed Mr. James D. Colt a receiver of the property of the corporation within that jurisdiction. On the morning of May 9th Mr. Bien was informed of that proceeding, and was retained for the company for the purpose of proceeding at once to Boston to protect the interests of the corporation. He demanded a retaining fee of $2,000. Thereupon a cheque for $2,000. dated May 9th, drawn by the defendant company upon the Colonial Bank in which it kept a deposit account, was delivered to Mr. Bien; it was drawn to the order of "Harvey Watson, Manager" and endorsed "pay to the order of Franklin Bien on account of retainer, Harvey Watson, Mgr." At the time of these transactions which took place in the morning no receiver had been appointed in this jurisdiction,
81 but later in the same day, the papers in this suit being presented to the court, Mr. Colt and Mr. Walter D. Edmonds were appointed receivers of the property of the defendant corporation in this jurisdiction and about 4 P. M. said receiver Edmonds having duly qualified went to the office of the company served a certified copy of the order upon the proper officer and demanded delivery of all its property and assets. The papers were promptly turned over to Mr. Bien and he was, some hours after he had received the cheque, informed that receivers had been appointed in this jurisdiction.

This cheque was not presented to the bank until the next day when it was certified (the bank not having yet been advised of the appointment of receivers); subsequently it was paid to Mr. Bien.

The statute law of this state provides that "a check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check." Negotiable Instruments Law, Section 325. This is but a statutory expression of what was before the well settled law in both the state and federal courts. Attorney General *v.* Continental Life Ins. Co. 71 N. Y. 325, Florence Mining Company *v.* Brown, 124 U. S. 385, and it disposes of this case.

On the morning of the 10th when the check was presented for acceptance (certification) there had been no assignment legal or equitable of any part of the moneys of the Haight & Freese Company on deposit with the Colonial Bank. The bank was debtor to the company for whatever balance stood to the latter's credit which it was to pay out on the order of the corporation. Down to the time when the bank actually executed its acceptance payment of the check might have been countermanded by the company and in such case
82 it would be the duty of the bank to refuse payment. The money on deposit was property of the company which was not turned over to Mr. Bien until the morning of the 10th (when the check was certified) and at that time he knew that receivers in this jurisdiction had been appointed, and that he was receiving from the bank money which should be turned over to them. As an employee

of the company, its retained counsel, and as an officer of this court he may not retain in his possession property of the company thus obtained.

Receivers may take an order directing payment with interest within ten days.

(Endorsed:) Circuit Court of the United States, for the Southern District of New York.—Ridgway Bowker, *vs.* Haight & Freese Co. *et al.*—Opinion, Lacombe, C. J.—U. S. Circuit Court, Southern District New York, Filed May 26, 1906, John A. Shields, Clerk.

83 At a Stated Term of the Circuit Court of the United States, held in and for the Southern District of New York, at the United States Court House in the Borough of Manhattan, New York City, on the 29th day of May, 1906.

Present: Hon. E. Henry Lacombe, Circuit Judge.

RIDGWAY BOWKER, Complainant,
against
HAIGHT AND FREESE COMPANY ET AL., Defendants.

An application for an order requiring Franklin Bien to pay over to the receivers the sum of Two thousand dollars, the proceeds of a certain check received by him, together with interest thereon having come on regularly to be heard now on reading and filing the order to show cause dated June 21st, 1905, the petition of Beverly R. Robinson, verified June 21st, 1905, the affidavit of Beverly R. Robinson, verified June 21st, 1905, the affidavit of William P. Maloney verified June 21st, 1905, the affidavit of James D. Colt, verified September 21st, 1905, and upon the order of this Court made in this cause and filed in the office of the Clerk of this Court on the 9th day of May, 1905, by which order James D. Colt and Walter D. Edmonds were appointed receivers of the property of the defendant Haight and Freese Company, all of which were read in support of the motion, and the affidavit of Franklin Bien, verified March 7th, 1906, the affidavit of Albert I. Sire, verified March 8th, 1906, the affidavit of Bennett E. Siegelstein, verified March 8th, 1906, the affidavit of Hervey Watson, verified March 14th, 1906, and the affidavit
84 of Franklin Bien, verified March 28th, 1906, the affidavit of William F. Donnelly, verified March 28th, 1906, and the affidavit of R. F. Fuller, verified March 28th, 1906, all of which were read in opposition to the motion, and after hearing Frederick J. Moses of counsel for the receiver Robinson in support of the application and Franklin Bien, solicitor for the defendant Haight and Freese Company, and respondent in person in opposition thereto, it is

Ordered, that Franklin Bien, pay to James D. Colt and Beverley R. Robinson, as receivers of the property of the defendant Haight and Freese Company the sum of Two Thousand Dollars the proceeds of the check mentioned in the said petition and affidavits, together

with interest thereon from the 10th day of May, 1905, within ten days after service of this order upon him.

E. HENRY LACOMBE, *U. S. C. J.*

(Endorsed:) In the Circuit Court of the U. S., for the Southern District of N. Y.—Ridgway Bowker, Complainant, against Haight and Freese Company, *et al.* Defendants.—Order.—Moses, Morris & Westervelt, Attorneys for Receiver, No. 32 Liberty St. New York City.—U. S. Circuit Court, Southern District New York, Filed May 29, 1906, John A. Shields, Clerk.

85 In the Circuit Court of the United States for the Southern District of New York.

FRANKLIN BIEN, Plaintiff in Error,
against
BEVERLEY R. ROBINSON, as Receiver of the Property and Assets of Haight and Freese Company, Corporation, Defendant in Error.

To the Honorable the Judges of the Supreme Court of the United States.

1st. That in an action pending in the Circuit Court of the United States for the Southern District of New York, wherein Ridgway Bowker was complainant and Haight and Freese Company, *et al.*, defendants, an application was made by Beverley R. Robinson, as Receiver of the property and assets of the Haight and Freese Company, corporation, defendant in error, to compel Franklin Bien, plaintiff in error, to pay over to the said receiver the sum of Two thousand ($2,000.00) dollars, the proceeds of a certain check received by him, together with interest thereon; that the said application was upheld by the said Franklin Bien, plaintiff in error, upon the ground that the said check was received prior to the institution or filing of any bill of complaint and the appointment of a receiver or receivers within the jurisdiction of the Circuit Court of the United States for the Southern District of New York.

Further on the ground that the said Franklin Bien plaintiff in error, was not an officer of the said corporation Haight and Freese Company, and that the Circuit Court of the United States for the Southern District of New York had no jurisdiction over him

86 to compel the repayment of the said sum of Two thousand ($2,000.00) dollars.

Further that Franklin Bien, plaintiff in error, claimed the said sum of Two thousand ($2,000.) dollars adversely to the said Beverley R. Robinson, defendant in error, and that on a summary proceeding this court had no jurisdiction to compel the said sum of Two thousand ($2,000.) dollars.

Further that the Circuit Court of the United States for the Southern District of New York had no jurisdiction on a summary proceeding to compel the plaintiff in error to pay to the defendant

in error the sum of Two thousand ($2,000.) dollars, but that the said defendant in error should have been remitted to his action at law for the recovery of the said sum of Two thousand ($2,000.) Dollars.

Further that the making of the order in the summary manner it was made deprived the plaintiff in error of his right to interpose a defense to the claim of the defendant in error, and deprived him of his trial by jury, as provided by the constitution of the United States.

2nd. That the plaintiff in error raised such jurisdictional objections upon the hearing to dismiss the bill and that all such jurisdictional objections were overruled and an order made, entered and filed granting the application of the defendant in error, directing the plaintiff in error to repay the said sum of Two thousand ($2,000.) dollars.

3rd. That in the aforesaid order or decree granting the motion directing the plaintiff in error to repay the said sum of Two thousand ($2,000) dollars various errors were committed to the prejudice and against the constitutional rights of the plaintiff in error, as more fully appears in the Assignment of Errors filed with this Petition and that petitioner is desirous of obtaining a review thereof upon the said Writ of Error by the Supreme Court of the United States.

87 4th. That your petitioner has caused to be issued, executed and filed a bond in the full and just sum of Two hundred and fifty ($250.) dollars, with good and sufficient sureties, conditioned to prosecute said Writ of Error to effect and answer all damages and costs if he fails to make his plea good.

Wherefore, your petitioner prays that a Writ of Error be made and issued herein for a review of the said Order or Decree, in the manner provided by law for the correction of the said errors as complained of.

FRANKLIN BIEN,
By ALBERT I. SIRE,
Attorney for Pl'ff in Error.

(Endorsed:) U. S. Circuit Court.—Franklin Bien, Plaintiff in error, against Beverly R. Robinson, &c. Defendant in Error—Petition.—Albert I. Sire, Attorney for Plff. in Error, 99 Nassau St. New York City.—Service of a copy of the within is hereby admitted. Dated New York, June 18, 1906. Frederick J. Moses, Attorney for Deft. in Error.—U. S. Circuit Court, Southern District New York, Filed Jun- 19, 1906, John A. Shields, Clerk.

88 In the Circuit Court of the United States for the Southern District of New York.

FRANKLIN BIEN, Plaintiff in Error,
against
BEVERLEY R. ROBINSON, as Receiver of the Property and Assets of Haight and Freese Company, Corporation, Defendant in Error.

Now comes Franklin Bien, plaintiff in error, by Albert I. Sire, his attorney, and says that in the record and proceedings in the above-entitled action there are manifest errors, to wit:

1st. That the Circuit Court of the United States for the Southern District of New York had no jurisdiction over the persons or subject matter of the proceedings, in that the said plaintiff in error was not an officer of defendant-corporation.

2nd. That the said Circuit Court of the United States for the Southern District of New York had no jurisdiction over the persons or subject matter of the proceeding, in that the said plaintiff in error received the check prior to the filing of any Bill of Complaint or Appointment of a Receiver or Receivers within the jurisdiction of the Circuit Court of the United States for the Southern District of New York.

3rd. That the said Circuit Court of the United States for the Southern District of New York had no jurisdiction over the persons or subject matter of the proceeding, in that the said plaintiff in error claimed the said fund adversely to the Receiver or Receivers and that the Court on a summary proceeding could not compel the plaintiff in error to repay the said sum of Two thousand ($2,000.) dollars.

89 4th. That the said Circuit Court of the United States for the Southern District of New York was without jurisdiction in that if the said sum was to be recovered the said defendant in error had to be remitted to an action at law or any other proceeding against the plaintiff to recover the said sum of Two thousand ($2,000.) dollars.

5th. That the said Circuit Court of the United States for the Southern District of New York could not in a summary proceeding compel the Plaintiff in Error to repay the said sum of Two thousand ($2,000.) dollars to defendant in error and thus deprive him of any defense he may have to said claim, or to a jury trial, as provided by the Constitution of the United States.

6th. That the Circuit Court of the United States for the Southern District of New York refused and denied the application of the Plaintiff in Error to compel the Defendant in Error to bring any action he may be advised for the recovery of the said sum of Two thousand ($2,000.) dollars, and therefore deprive the Plaintiff in Error of his property without due process of law, as provided for by the Constitution and Laws of the United States.

Wherefore, the said Franklin Bien, plaintiff in error, prays that

the Order or Decree and matter herein be reviewed by the Supreme Court of the United States, and such relief further in the premises as may be just and proper.

ALBERT I. SIRE,
Attorney for Plaintiff in Error, 99 Nassau Street, Borough of Manhattan, New York City.

(Endorsed:) U. S. Circuit Court.—Franklin Bien, Plaintiff in Error, against Beverley R. Robinson, &c. Defendant in
90 error.—Assignment of Errors.—Albert I. Sire, Attorney for Plff. in Error, 99 Nassau St New York City.—Service of a copy of the within is hereby admitted. Dated New York, June 18, 1906. Frederick J. Moses, Attorney for Deft. in Error.—U. S. Circuit Court, Southern District New York. Filed Jun- 19, 1906, John A. Shields, Clerk.

91 In the Circuit Court of the United States for the Southern District of New York.

FRANKLIN BIEN, Plaintiff in Error,
against
BEVERLEY R. ROBINSON, as Receiver of the Property and Assets of Haight and Freese Company, Corporation, Defendant in Error.

An application having been made by the above-named plaintiff in error, Franklin Bien, upon an Assignment of Errors and Petition for Appeal from the order entered herein on the 29th day of May, 1906, directing the said Plaintiff in Error to repay to the Defendant in Error the sum of Two Thousand ($2,000.) dollars the proceeds of a certain check received by him, together with interest thereon, upon the ground that this Court had no jurisdiction to make the order as in said petition for Appeal and Assignment of Errors appears, and the Plaintiff in Error having duly presented his Bond on Appeal, which has been duly approved and Citation issued and Writ of Error allowed, this Court does hereby

Certify to the Supreme Court of the United States that the question of jurisdiction was involved in making the Order of May 29th, 1906.

E. HENRY LACOMBE,
United States Circuit Court Judge.

(Endorsed:) U. S. Circuit Court—Franklin Bien, Plaintiff in Error, against Beverly R. Robinson &c., Defendant in Error. Order certifying question.—Albert I. Sire, Attorney for Plff. in Error, 99 Nassau St. New York City.—Service of a copy of the within is hereby admitted. Dated New York, June 18th, 1906. Frederick J. Moses, Attorney for Deft. in Error.—U. S. Circuit Court, Southern District New York. Filed Jun- 19, 1906, John A. Shields, Clerk.

92 Circuit Court of the United States for the Southern District of New York.

FRANKLIN BIEN, Plaintiff in Error,
against
BEVERLEY R. ROBINSON, as Receiver of the Property of the Haight & Freese Co., Defendant in Error.

Know all men by these presents: That we, William F. Donnelly of 401 W. 22nd Street, New York, N. Y. and Joseph B. Bissell of No. 46 W. 55th Street, New York, N. Y. are held and firmly bound unto Beverley R. Robinson, as receiver of the property of the Haight & Freese Company, defendant in error, in the full and just sum of Two hundred and fifty dollars, to be paid to the said defendant in error, his successor and assigns, for which payment well and truly to be made, we bind ourselves, and our successors or assigns firmly by these presents.

Signed with our seals. Dated this 14th day of June, 1906.

Whereas the above named Franklin Bien, plaintiff in error, has prosecuted a writ of error to the Supreme Court of the United States, to reverse the order or decree rendered against plaintiff in error by a Judge of the Circuit Court of the United States, for the Southern District of New York

Now, therefore, the condition of this obligation is such that if the above bounden Franklin Bien, plaintiff in error, shall prosecute said writ of error to effect and answer all damages and costs, if he fail to make good his plea, then this obligation to be void, otherwise
93 to remain in full force and effect.

WILLIAM F. DONNELLY. [SEAL.]
JOSEPH B. BISSELL. [SEAL.]

UNITED STATES OF AMERICA, *Southern District of New York, ss:*

William F. Donnelly, being duly sworn, deposes and says, that he is worth One thousand dollars over and above all just debts and liabilities and exemptions.

WILLIAM F. DONNELLY.

Subscribed and sworn to before me this 14th day of June, 1906.

THOMAS ADAM,
[SEAL.] *Notary Public, N. Y. Co.*

UNITED STATES OF AMERICA, *Southern District of New York, ss:*

Joseph B. Bissell, being duly sworn, deposes and says, that he is worth one thousand dollars over and above all just debts and liabilities and exemptions.

JOSEPH B. BISSELL.

Subscribed and sworn to before me, this 14th day of June, 1906.

THOMAS ADAM,
[SEAL.] *Notary Public, N. Y. Co.*

UNITED STATES OF AMERICA, *Southern District of New York, ss:*

On this 14th day of June, 1906, before me duly appeared the above named William F. Donnelly and Joseph B. Bissell, to me known and known to me to be the persons described in and who executed the foregoing bond, and severally acknowledged to
94 me that they executed the same for the purposes therein mentioned.

THOMAS ADAM,
[SEAL.] *Notary Public, N. Y. Co.*

Approved.
N. Y., June 16th, 1906.
E. HENRY LACOMBE,
Justice U. S. Circuit Court

(Endorsed:) U. S. Circuit Court, Southern District of New York.—Franklin Bien, Plaintiff in Error, against Beverley R. Robinson as Receiver &c. Defendant in Error—Bond.—Albert I. Sire, Solicitor for Plaintiff in error, 99 Nassau St. New York City.—Service of a copy of the within is hereby admitted. Dated New York, June 18, 1906. Frederick J. Moses, Attorney for Def't in error.—U. S. Circuit Court, Southern District New York, Filed Jun- 19, 1906, John A. Shields, Clerk.

95 In the Circuit Court of the United States for the Southern District of New York.

FRANKLIN BIEN, Plaintiff in Error,
against
BEVERLEY R. ROBINSON, as Receiver of the Property and Assets of Haight and Freese Company, Corporation, Defendant in Error.

United States of America to Beverley R. Robinson, Receiver, etc., Greeting:

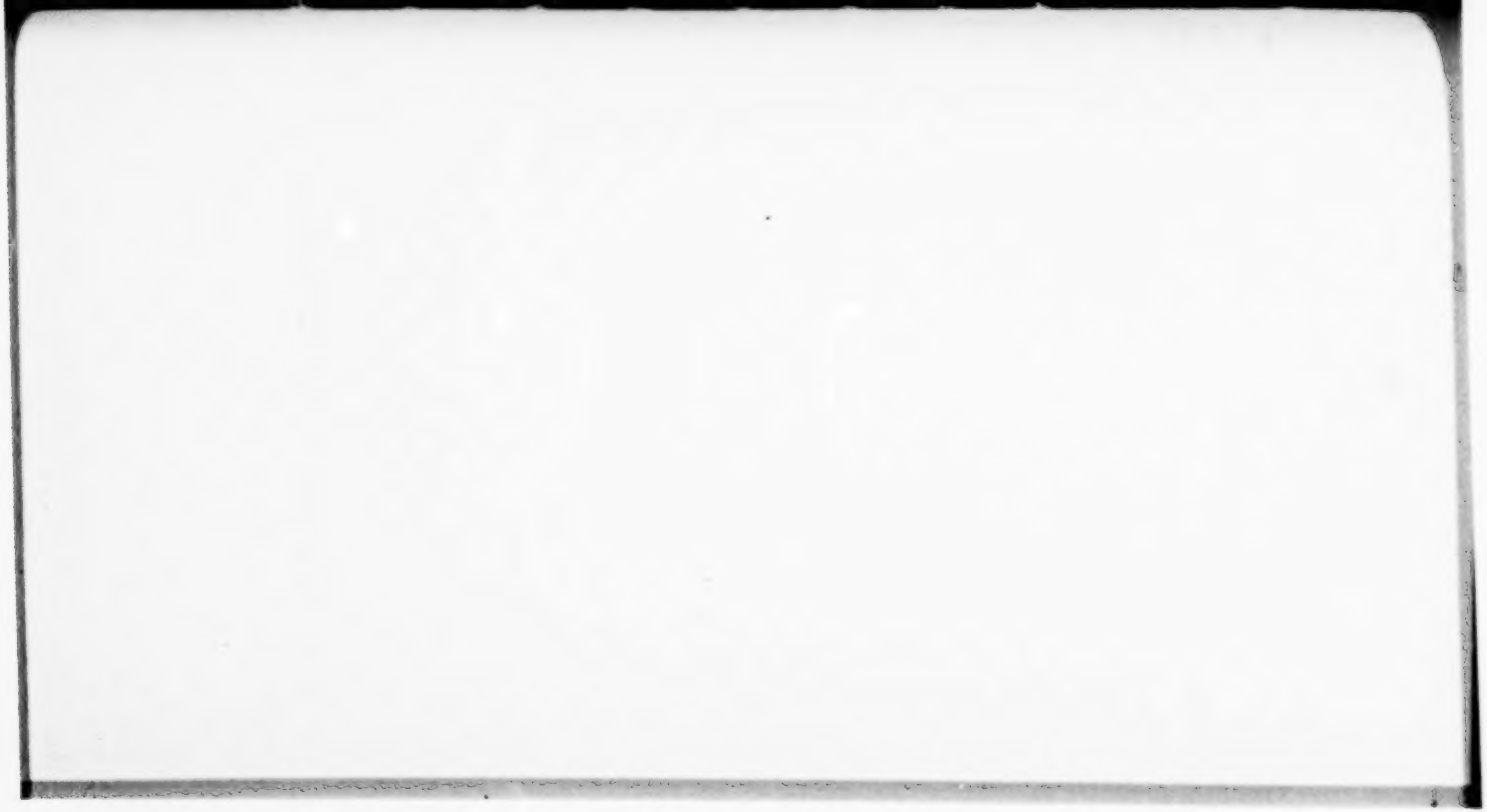
You are hereby cited and required to be and appear at the Supreme Court of the United States to be holden at Washington, within thirty days from the date hereof, pursuant to a Writ of Error filed with the Clerk of the Circuit Court of the United States for the Southern District of New York, wherein Franklin Bien is plaintiff in Error and you are defendant in Error to show cause, if any there be, why the Order or Judgment rendered against the said plaintiff in Error as in said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States this 16th day of June in the year of our Lord, one thousand nine hundred and six.

E. H. LACOMBE,
United States Circuit Court Judge.

96 [Endorsed:] E. & Ac. 2471. U. S. Circuit Court. Franklin Bien Plaintiff, in error against Beverly R. Robinson &c. Defendant in error Orig. Citation Albert I. Sire, Attorney for Pl'ff in error 99 Nassau Street, Bennett Building, N. Y. City. Service of a copy of the within is hereby admitted. Dated New York, June 18" 1906. Frederick J. Moses Attorney for def't in error U. S. Circuit Court Filed Jun- 19 1906 Southern District, New York. John A. Shields, Clerk.

Endorsed on cover: File No. 20,423. S. New York, C. C. U. S. Term No. 458. Franklin Bien, plaintiff in error, *vs.* Beverly R. Robinson, receiver of the property and assets of the Haight & Freese Company. Filed October 16th, 1906. File No. 20,423.



FILED.
NOV 29 1907
JAMES H. McKENN

No. 135.

United States Supreme Court

[redacted]

FRANKLIN BIEN,

Plaintiff in Error,

against

BEVERLY R. ROBINSON, Receiver of the Property and Assets of the Haight & Freese Company,

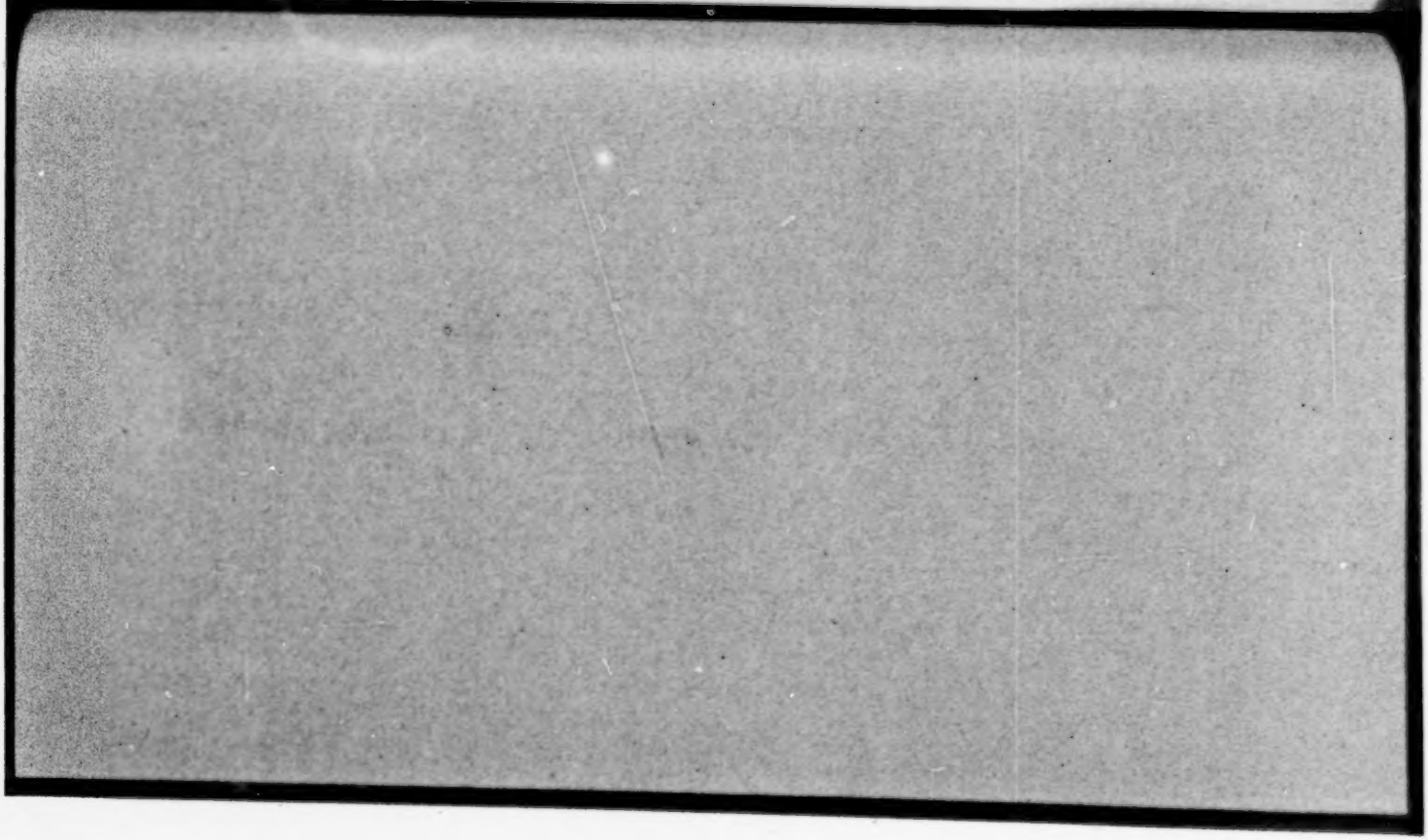
Defendant in Error.

(20,423.)

Brief of Plaintiff in Error.

ALBERT I. SIRE,
of Counsel for Plaintiff in Error.

THE REPORTER CO., WALTON, N. Y.
N. Y. Office, Charles Watson Russell,
253 Broadway, Room 225, Telephone 1253 Cort.



Supreme Court of the United States.

October Term, 1906.

FRANKLIN BIEN, Plaintiff in Error, against BEVERLY R. ROBINSON, Receiver of the Property and Assets of the Haight & Freese Company, Defendant in Error. (20,423.)	No. 458.

BRIEF OF PLAINTIFF IN ERROR.

Statement.

This case comes up on a writ of error, which seeks to bring up for review an order or decree entered in a suit in equity in the United States Circuit Court for the Southern District of New York, directing Franklin Bien, attorney for Haight & Freese Company, to pay to the recivers of said company the sum of $2,000 with interest (page 38).

The assignment of errors (pages 39-40) alleges want of jurisdiction in said Circuit Court, also an alleged violation of the Constitution of the United States by denial to plaintiff in error of a jury trial and depriving him of his property without due process of law.

The facts are as follows:

On May 8th, 1905, Judge Lowell in the United States Circuit Court for the District of Massachusetts, appointed James D. Colt receiver of the property of Haight & Freese Company within that jurisdiction, *ex parte* and without notice, who thereafter immediately took possession. Thereupon Franklin Bien was retained as counsel for Haight & Freese Company for the purpose of proceeding to Boston, Massachusetts, to protect the interests of the corporation, and then and there received as a retainer $2,000 in the form of a check drawn on the funds of Haight & Freese Company, which check was endorsed by him, and thereafter delivered to third parties who cashed the same (page 35).

Acting on the decree of the Circuit Court for the District of Massachusetts, the United States Circuit Court for the Southern District of New York, on May 9th, 1905, *ex parte*, upon the application of one Ridgway Bowker in an action in equity instituted against the Haight & Freese Company, appointed receivers in said jurisdiction.

Plaintiff in error had never been employed by and never known Haight & Freese Company prior to his retainer as counsel in the Boston suit. Although the receivers knew of the certification of this check on May 9th, 1905, nothing was done by them until June 21st, 1905, when they instituted summary proceedings in the United States Circuit Court for the Southern District of New York to compel plaintiff in error to pay over to said receivers the $2,000 with interest from May 10th, 1905 (page 22).

The opposition to said application is found in the affidavits of plaintiff in error (page 29), Albert I. Sire (page 31), Harvey Watson (page 32), Bennett E. Siegelstein (page 33), Franklin Bien (page 34), William F. Donnelly (page 35) and R. F. Fuller, manager of the Colonial Bank (page 36) showing the

transactions so far as his bank was concerned. These affidavits not only raised the question of jurisdiction, but showed the entire transaction, that every effort was made by plaintiff in error to ascertain, from an examination of the records in the United States Circuit Court for the Southern District of New York, whether at the time of his retainer in the Boston case, an action or proceeding had been instituted in the New York Court and a receiver appointed of the funds of the corporation. Plaintiff in error having ascertained no action had been instituted or receiver appointed acted in good faith in accepting the check for $2,000 as a retainer, which he endorsed and delivered to third parties who cashed the same.

In the opinion of the learned Judge below (page 36) the question of good faith is not challenged. The court holds that the receipt of the check by plaintiff in error prior to the appointment of the receivers in New York (although cashed by other parties) was no payment and conveyed no title in that amount to the funds deposited in the bank to the credit of Haight & Freese Company, but belonged to the receiver, and plaintiff in error was subject to a summary order, although he was not a director, employee of, or otherwise connected with Haight & Freese Company (defendant in said action) and simply received it as a retainer as counsel for said company in the Boston suit, prior to the institution of the suit in New York. The funds of the Haight & Freese Company in the jurisdiction of the New York court did not become vested in the receivers appointed by the Massachusetts Court; the receivers appointed by the New York Court did not become vested with the title to the property and assets of Haight & Freese Company until May 9th, 1905, and after payment had been made to plaintiff in error. There is no claim that the check was received by plaintiff in error *after* the commencement of the action.

I.

The order or decree was final so far as plaintiff in error was concerned and therefore reviewable by this Honorable Court.

The first proposition plaintiff in error desires to present to this Honorable Court is, that the order directing him to pay money to the receivers upon which he claimed a lien, was a final order or decree so far as plaintiff in error was concerned. Plaintiff in error received the money as a retainer as counsel prior to the institution of the action in New York, to proceed to Massachusetts to protect the interest of the Haight & Freese Company in proceedings instituted against it in that jurisdiction, which action was the foundation for the appointment of the receivers in the New York action. Plaintiff in error had never been connected with the Haight & Freese Company in any capacity whatever, prior to his retainer May 9th, 1905, and objected to the summary proceedings to deprive him of the $2,000, upon the ground that he claimed title thereto and demanded his right of trial by jury in an action to be instituted by the receivers when the proper time came to institute such an action, in which he might defend his title to the said fund. The court, however, virtually tried the issues upon the affidavits and made a summary final order, judgment or decree against plaintiff in error (page 38), which reads as follows:

> "Ordered that Franklin Bien, pay to James D. Colt and Beverley R. Robinson, as receivers of the property of the defendant Haight and Freese Company the sum of Two thousand Dollars the proceeds of the check mentioned in the said petition and affidavits, together with interest thereon from the 10th day of May, 1905, within ten days after service of this order from him."

We respectfully submit this was a final order or decree depriving plaintiff in error of property in a summary proceeding not instituted against him in any form, shape or manner, but because he received a check on May 9th, 1905, before the receivers were appointed or the action commenced—it not having been certified until after the appointment of the receivers—it was claimed that it was the property of the receivers. The objections raised to the jurisdiction of the court (including the question of the court's right to make an order against a person who had received property prior to the appointment of the receivers and claimed title thereto) could not be disposed of upon a summary application but only in an action in which plaintiff in error would be entitled to a jury trial. These objections were overruled and the proper form to bring up this question was not by appeal but by a writ of error, which was allowed and the question of jurisdiction certified to this Honorable Court.

Therefore we respectfully submit, in so far as plaintiff in error was concerned, it was a final judgment, decree or order and could not be reviewed on appeal by writ of error from a final judgment to be entered herein, because plaintiff in error not being a party to the record in such proceeding would have no standing on an appeal from such final judgment.

II.

The record is not defective in not making James D. Colt, receiver, a party to the proceeding.

The only party properly before the court is Beverley R. Robinson, as receiver of the property of Haight & Freese Company. We do not intend to present any extended argument to this Honorable Court upon that

proposition except to call attention to the fact that the proceedings are instituted upon the petition of Robinson as receiver of Haight & Freese Company. The notice of motion to compel plaintiff in error to pay over reads as follows (page 27):

"In the Circuit Court of the United States for the Southern District of New York.

RIDGWAY BOWKER,
Complainant,
against
HAIGHT AND FREESE COMPANY, *et al.*,
Defendants.

Sir: Please take notice that an affidavit of which the annexed is a copy will be submitted to the court in support of the motion to compel Franklin Bien to pay over to the receivers the proceeds of a check for $2,000 received by him from the Haight and Freese Company, which motion has been adjourned to March 30, 1906.

Dated, New York, March 24, 1906.

Yours, &c.,
FREDERICK J. MOSES,
Solicitor for Receiver Robinson,
Office and Post Office Address,
32 Liberty Street,
Borough of Manhattan,
City of New York.

To
Franklin Bien, Esq.,
Attorney for defendant Company,
Roger Foster, Esq.,
Solicitor for receiver Colt."

As Receiver Colt was simply appointed ancillary receiver (as he had been appointed receiver in Boston) and the notice of motion having run to him, he could not oppose any application made by his co-receiver.

In the order directing payment of the $2,000 the only counsel recited are as follows (page 38):

"And after hearing Frederick J. Moses, of counsel for the receiver Robinson in support of the application, and Franklin Bien, solicitor for the defendant Haight and Freese Company, and respondent in person, in opposition thereto, it is

Ordered that Franklin Bien pay to James D. Colt and Beverley R. Robinson, as receivers" etc.

If the receiver Colt desired to be made a party to the proceeding then his counsel should have moved to resettle the order by showing that the receiver Colt (who now claims the proceedings are defective in failing to make him a party) appeared upon the application by counsel, but as the record now stands the motion having been made by the Solicitor for Robinson alone the only proper parties to the proceedings are those recited in the order, to wit, plaintiff and defendant in error. The proper place to correct the proceedings was in the court below and even if the objection might be worthy of some consideration it is too late (almost two years having elapsed) to ask the court to hold that the proceedings are defective by failing to make Colt a party thereto.

III.

The Court had no jurisdiction in appointment of receivers or to make the order.

As appears by the papers on which the application is made, we contend the United States Circuit Court for the Southern District of New York, in equity, had no jurisdiction, in that the cause of action set forth in the affidavit of Ridgway Bowker complainant (pages 4-8) shows he was a customer of Haight & Freese Company, speculating upon margin, in the purchase and sale of stocks, which was dependent upon the rise and fall of the market. It does not appear that Bowker had any trust relations whatever with the Haight & Freese Company, or was a judgment creditor with execution returned unsatisfied, or that he had any equitable lien upon any property in the hands of said company, but in other words, he simply was a creditor at large whose claim was unliquidated; he sought to enforce the payment of his debt in a court of equity by having the court establish the amount of his claim, and taking possession of the property divide it *pro rata* among him and such others who might join in the action, or the creditors generally.

Plaintiff in error therefore contends that the United Circuit Court for the Southern District Court of New York in equity, had no jurisdiction and could have none unless Bowker was a judgment creditor with an execution returned unsatisfied.

The Revised Statutes of the United States, Section 723, (U. S. Complete Statutes 1901, page 583) provides:

> "Suits in equity shall not be sustained in either of the courts of the United States, in any case where a plain, adequate and complete remedy may be had at law."

In the case of *Smith vs. Railroad Co.*, 99 U. S. Supreme Court, 398, (opinion by Mr. Justice Swayne) the learned Court in discussing the questions presented, states (page 401):

> "But nothing is better settled than that such a bill must be preceded by a judgment at law, establishing the measure and validity of the demand of complainant, for which he seeks satisfaction in the chancery. Citing Wiggins v. Armstrong, 2 Johns. (N. Y.), Ch. 144; Hendricks v. Robinson, *id.*, 296; Greenway v. Thomas, 14 Ill., 271; Mizzel v. Herbert, 12 Miss., (Smed. & M.), 550; Gorton v. Massey, 12 Minn., 147; Skele v. Stanwood, 33 Me., 309; Sexton v. Wheatin, 1 Am. Lead. Cas. (5th Ed.), 59."

In the case of *Van Weel v. Winston*, 115 U. S., 228 (opinion by Mr. Justice Miller) the Court held (page 245):

> "If Mr. Winston cheated this company out of its money, the right to redress for that wrong is in the company or in its stockholders. As a creditor of the company, Mr. Van Weel has no right to interfere in the matter until he had a judgment against the company, with an execution returned *nulla bona*."

That the Haight & Freese Company, under allegations of this kind had an absolute right to a trial by jury has been decided in the case of *Indian Land & Trust Co., vs. Shoenfelt*, 135 Fed. Rep., 484 (opinion by Mr. Justice Sanborn), in which the court held (page 485):

> "Congress has enacted that 'suits in equity shall not be sustained in either of the courts of the United States, in any case where a plain, adequate and complete remedy may be had at

> law.' Revised Statutes, Sec. 723, (U. S. Com. St. 1901, page 583). In Hipp vs. Babin, 19 How., 271, 278, (15 L. Ed., 633) the Supreme Court declared that 'whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury.' Thomas v. Council Bluffs Canning Co., 34 C. C. A., 428, 431, 92 Fed., 422, 424."

In the case of *Alger vs. Anderson*, 92 Fed. Rep., 696 (opinion by Mr. Justice Clark), this learned Court will find a discussion of the various cases distinguished between the law and equity sides of the court, which, we contend, sustain the contention of plaintiff in error, that the bill of complaint shows distinctly that Bowker has a plain, adequate and complete remedy at law, and therefore there was no jurisdiction in the equity side of the United States Circuit Court.

In that case the Court states (page 711): . .

> "In Association vs. Hutsell, 31 U. S. App., 214, 14 C. C. A., 97, 66 Fed., 799, where it was again held, that fraud alone furnishes no ground upon which a court of equity will afford relief, and that, unless preventative or other equitable relief is sought, the remedy for fraud is at law."

See also

> Hollins vs. Brierfield Coal & Iron Co., 150 U. S., 371.

So upon an examination of the affidavit of Bowker we do not find that he is a judgment creditor with an execution unsatisfied, that he had any trust relations with the Haight & Freese Company, or that he had

any equitable lien on any property in the hands of said company, or that he was even entitled to an accounting.

This question has been frequently discussed in the Court of Appeals of the State of New York, and we herewith submit to this Honorable Court for its consideration upon that proposition, the following cases:

Content vs. Banner, 184 N. Y., 121.
Gillett vs. Whiting, 120 N. Y., 402.
Baker vs. Drake, 66 N. Y., 518.
Markham vs. Jaudon, 41 N. Y., 235.

Should counsel for defendant in error cite on this proposition to the contrary, the case of Marvin vs Brooks, 94 N. Y., 71, we respectfully submit that case has no application whatever to the question presented. In that case the contract between the parties was a *quasi* partnership, the defendant purchased certain securities, under an agreement between him and plaintiff, that the purchase should be made on joint account, each to furnish one-half of the purchase money, and that plaintiff placed in the hands of Brooks sufficient funds to pay for his one-half. The court held, under that agreement, Brooks became the agent of the plaintiff as to the one-half interest of the latter, and a *quasi* trustee of the money placed in his hands, and of the property purchased; that plaintiff had the right to call Brooks to account in equity, and the burden was upon the latter of showing both the price paid and what property was purchased.

That is not the case of Bowker vs. Haight & Freese Company, in which receivers were appointed in the court below; that case was simply broker and customer, under an ordinary contract for speculative purchase and sale of stocks, and therefore the relations were that of pledgor and pledgee, as held in the cases heretofore cited.

We respectfully submit, if this reasoning is correct, then the United States Circuit Court for the Southern

District of New York had no jurisdiction in the first instance, and the appointment of the receivers was absolutely null and void; if that is so, the court had no power to make any order directing plaintiff in error to return the $2,000 to the receiver in summary proceedings, where he was not a party to the action or an officer of the corporation, although he afterwards appeared as attorney for the Haight & Freese Company in the proceedings instituted against it in the New York court, but the $2,000 received was not as a retainer in that action, but in the Boston suit, and was received before the action in New York was instituted.

IV.

Claim of plaintiff in error adverse to the receiver of corporation.

While it may be true that the court below could, by a process in summary proceedings, enforce a delivery to its receiver of property belonging to the corporation of which the receiver was appointed, where such property was held by any of its officers or employees, yet it cannot make such an order against a person or persons to whom such property may have been delivered, whose claims are adverse to that of the receiver.

There is no evidence presented that plaintiff in error received this money from the corporation to prevent the same coming into the hands of the receiver to be appointed in an action not then instituted, or that he knew of the financial condition of the corporation; he never had any transactions with it prior to that time. Upon an examination of the records, he found no proceedings had been instituted in the New York court or receivers appointed within that jurisdiction, and finding none, he was justified in accepting the $2,000 as counsel fee on May 9th, 1905, to proceed to

Boston to protect the interests of the Haight & Freese Company in proceedings instituted in that jurisdiction.

Counsel had a right to demand a retainer, and there is no evidence presented or claim made that the amount received was exorbitant. The only question raised was, because a receiver was appointed before the bank paid the check—it having gone through the hands of third parties—it made no difference whether the transaction was honest or not, as a question of law, the receiver was entitled to possession.

In support of our contention, we submit the following authorities:

In Parker vs. Browning, 8 Paige, N. Y. Ch. Rep., 388, the opinion says (page 390):

> "And if the property is in the possession of a third person who claims the right to retain it, the receiver must either proceed by suit, in the ordinary way, to try his right to it, or complainant should have made such third person a party to the suit and apply to have the receivership extended to the property in his hands, so that an order for the delivery of the property may be made which will be binding upon him, and which may be enforced by process of contempt, if it is not obeyed."

In the case of Sullivan vs. Colby, 71 Fed. Rep., 460, the court held (page 463):

> "We entertain no doubt of the power or jurisdiction of a court of equity to enter such rules, and upon the hearing to determine and enforce the rights of the receiver against a party accused of interference with the receiver's possession, or management, unless in his answer to the rule, he should set up some right or title of which he had and should claim the right of trial by jury, in which case, as we sup-

pose the rule would be discharged without any attempt to determine or adjudge the truth of the answer."

The court held in the case of Miles vs. New South Building & Loan Ass'n, 95 Fed. Rep., 919:

> "Where a court of equity has undertaken to administer the property and assets of an insolvent corporation and has appointed a receiver therefor, it has power in summary proceedings, on a petition of the receiver filed in the same suit against a second corporation having in its possession property of the defendant, to require such property turned over to the receiver, where the company against which the petition is filed, claims no interest therein in its own right, but holds it merely as trustee to secure certain creditors, and the stockholders of defendant, as such order affects no right in the property and the interests of the trustee as well as the beneficiaries of the trust can be fully protected by the court. *It is only where a right to the property adverse to the defendant and its creditors is asserted by the party in possession, that a separate suit in which such right can be adjudicated is necessary.*"

We desire to call attention to the fact that the receivers appointed are not general receivers and have no powers as such, because the only court that could appoint a general receiver is the Supreme Court of the State of New York, within which jurisdiction the Haight & Freese Company is, said company having been incorporated under the laws of the State of New York.

In the case of Olney vs. Tanner, 10 Fed. Rep., 101, a general receiver had been appointed by the City Court of New York of the property of a judgment debtor and brought an action to compel defendant to

turn over property to him, which the receiver contended had been fraudulently assigned and delivered by the judgment debtor to the defendant prior to the appointment of the receiver. The court held the action could not be maintained but an action had to be brought by the receiver against Tanner as well as the judgment debtor, to set aside the transfer as fraudulent, before the receiver was entitled to possession of the property, and upon the further ground that the assignment and transfer had been made prior to the appointment of the receiver.

When this matter came before the Honorable Court below, plaintiff in error contended, upon these propositions, that he was entitled to a jury trial, that he claimed adverse to the title of the receiver, he had received the $2,000 (although by check) before the action had been instituted in New York or the receivers appointed, and not being an officer of the corporation, or a party to the proceedings or action, no summary order could be issued as against him, and the only way in which the question could be decided would be in an action against the plaintiff in error and the Haight & Freese Company charging them with fraud or misappropriation, in which action a jury trial could be demanded and the questions determined as provided for by law, but plaintiff in error could not be deprived of his money by a summary order; the court below simply dismissed such contention and made a final order, judgment or decree, directing plaintiff in error to pay over the $2,000.00.

If plaintiff in error waited for the final decree in said action and then come up on the appeal therefrom, as suggested by counsel for receiver Colt, this Honorable Court would have before it a motion to dismiss the appeal against plaintiff in error, on the ground that he had no standing in that action, and defendant could not raise the question, as it was not injured in any way, shape or manner. The only injury would be as against the plaintiff in error, and he not being a party to the

record, could not be heard on an appeal from the final judgment. Therefore plaintiff in error had no alternative but to do that which he did, obtain a writ of error to review the final order, judgment or decree depriving him of his property.

V.

Opinion of the Court below.

The opinion of the learned Judge in the court below seems to be based on the theory that the court had power, because it states in conclusion (page 37):

> "As an employee of the company, its retained counsel, and as an officer of this court he may not retain in his possession property of the company thus obtained."

Plaintiff in error contends that the record shows distinctly that he was not an employee of the corporation or an officer of the court, and never had any dealings with the corporation until he received a retainer of $2,000 to proceed to Boston to protect the interests of the company in the action instituted in that jurisdiction, and that he received the money by check prior to the institution of the New York action and the appointment of any receivers. How is it possible the learned court below should have held as it did, that plaintiff in error was an officer of the court, an employee of the corporation over whom the court had summary powers to deprive plaintiff in error of a jury trial and his right to contest in the proper forum his title to the money received.

We will concede, if the action had been instituted and the receivers appointed prior to the receipt of the money, then a different question might arise, and per-

haps the court below would have power to make a summary order. Plaintiff in error accepted the retainer, was justified in so doing and committed no act, by which the court had power to make a summary order to deprive him of his rights upon motion and affidavits.

VI.

We respectfully submit that this Honorable Court should reverse the adjudication in the Court below and either deny or dismiss the application made by the receiver for a summary order directing plaintiff in error to forthwith pay $2,000 as directed by the Court below.

Respectfully submitted,
ALBERT I. SIRE,
Counsel for Plaintiff in Error.

Supreme Court, U. S.
FILED
JAN 21 1908
JAMES H. MCKENNEY,
Clerk

United States Supreme Court

No. 133. October Term, 1907.

FRANKLIN BIEN,
Plaintiff in Error,

against

BEVERLY R. ROBINSON, Receiver of the Property and Assets of the Haight & Freese Company,
Defendant in Error.

(No. 20,422.)

Replying Brief of Plaintiff in Error.

ALBERT L. SIRE,
Of Counsel for Plaintiff in Error.

Evening Post Job Printing Office, 156 Fulton St., New York.

Supreme Court of the United States,

OCTOBER TERM, 1907.

FRANKLIN BIEN, Plaintiff in Error, AGAINST BEVERLY R. ROBINSON, Receiver of the property and assets of the Haight & Freese Company, Defendant in Error.	No. 135.

REPLYING BRIEF OF PLAINTIFF IN ERROR.

Statement.

Plaintiff in error desires to call the attention of this Honorable Court to one or two matters in reply to the claims of defendant in error as shown on his brief, and will concisely state the same.

POINTS.

I.

As to the jurisdictional question raised by plaintiff in error under Point III. of his original brief.

It is evident from an examination of the propositions presented in the brief of defendant in error,

that learned counsel misconceives the jurisdictional proposition presented by plaintiff in error, and does not in any way answer the same. The jurisdictional proposition presented by plaintiff in error, under Point III. of his original brief, was to the effect that the United States Circuit Court in equity had no jurisdiction, in that plaintiff was neither a judgment creditor with an execution returned unsatisfied, nor did he have any trust impressed upon the property in the hands of the Haight & Freese Company, nor any lien upon said property, and as neither of these three conditions existed said Court had no jurisdiction over the person or subject matter of the litigation. To substantiate that proposition he cited

Revised Statutes of the United States, Section 723 (U. S. Complete Statutes 1901, page 583);

Smith *vs.* Railroad Co., 99 U. S. Supreme Court, 398;

Van Weel *vs.* Winston, 115 U. S., 228 (Opinion, page 245);

Indian Land & Trust Co. *vs.* Shoenfelt, 135 Fed. Rep., 484 (Opinion, page 485), and cases cited;

Alger *vs.* Anderson, 92 Fed. Rep., 696,

and other cases found under Point III. of original brief.

Defendant in error claims that the Court had jurisdiction, for the reason that the appointment of the Receivers was made ancillary to those appointed by the United States Circuit Court, First Circuit, under an order or decree in the case of Weiss *vs.* Haight & Freese Co., in which judgment was rendered in favor of complainant against defendant and affirmed by the Circuit Court of Appeals, First Circuit (see Weiss *vs.* Haight & Freese Co., 148 Fed. Rep., 399); and because this Honorable Court refused to allow a writ of *certiorari* to review such decision, the ques-

tion had been virtually decided. That does not answer the point of jurisdiction that we raise.

The Receivers were originally appointed in the case of Weiss *vs.* Haight & Freese Company, in the First Circuit. The practice has always been and still is, where, under a decree, receivers of the property of a corporation are appointed within that jurisdiction, and the corporation has property in other jurisdictions, *an application is made by the receivers* in the various jurisdictions, upon their own petition, whereupon they are appointed ancillary receivers in such jurisdictions. As will be remembered in the Matter of the United States Ship Building Company, the original Receivers were appointed in the State of New Jersey by the United States Circuit Court; thereupon said Receivers made applications, and were appointed ancillary Receivers over the property of the corporation in various jurisdictions, from Maine to California.

But this was not done in this case. The Receivers appointed by the United States Circuit Court in the case of Weiss *vs.* Haight & Freese Company made no application, but Ridgway Bowker in an independent action in the Court below, entitled "Ridgway Bowker *vs.* Haight & Freese Company and others," asked for the appointment of receivers, because receivers had been appointed in another action, to wit, Weiss *vs.* Haight & Freese Company in the First Circuit (to which Ridgway Bowker was not a party). Thereupon, notwithstanding the objection of the Haight & Freese Company that the Court had no power or jurisdiction, ancillary Receivers were appointed, and their title rests not upon the original proceedings instituted in the case of Weiss *vs.* Haight & Freese Company in the First Circuit, but wholly upon the independent action brought by Ridgway Bowker against Haight & Freese Company. We therefore respectfully submit that that has no application to the question presented.

Again, the learned Circuit Court of Appeals, First Circuit, in the case of *Haight & Freese Company*,

Appellant, vs. *Anna L. H. Weiss, Appellee* (148 Fed. Rep., 339), on the question of jurisdiction as to the power of the court in equity in disposing of the question as to a creditor, whose claim had not been liquidated, in their opinion (Mr. Justice Putnam writing the same), held that the action was brought by *complainant to set aside a general release which had been procured from her on the ground of fraud, and as there was diversity of citizenship, the action was maintainable upon the equity side of that Court.*

This does not arise in this case. As shown by the printed record (pp. 4-8) this action was not to set aside a general release, because Bowker had not given any, but was, pure and simple, an action in equity by a creditor to have his claim liquidated, and then have the assets distributed. As matter of fact the equity side of the Circuit Court of the United States had absolutely no jurisdiction to entertain an action of that kind, so the effect of the decision in the Weiss case must be eliminated from this question presented.

The question of jurisdiction can be raised at any time, even for the first time before this Honorable Court, and this Court, of its own volition, where it appears that the Court below had no jurisdiction in the action, can raise the question and dispose of it. As already stated there is absolutely no answer in the brief of defendant in error to the jurisdictional question raised. It therefore must be conceded, as admitted and argued in the original brief of plaintiff in error, that the question of jurisdiction exists. If not, why did not defendant in error answer this proposition found in our original brief under Point III.

II.

As to summary proceedings.

We do not desire to weary this Honorable Court with any extended argument upon this proposition.

We contend that the authorities cited by counsel for defendant in error upon his brief have no application to the proposition we present, that the question could not be disposed of upon a summary application. The statement that plaintiff in error was an officer of the Court did not deprive him of any constitutional rights that he might have. At the time of the payment of the check, no action was pending, no injunction had been issued, and before accepting the check every precaution was taken to ascertain such information. The check was cashed by Mr. Donnelly and plaintiff in error proceeded to Boston, where he rendered numerous services on behalf of the corporation, not only to protect its interests, but also the interests of the creditors whose claims were adverse to that of the Receivers.

If the contention of the learned Judge in the Court below is correct, that because plaintiff in error happened to be a lawyer and admitted to practice in said Court, he became an officer of the Court, then no matter what fees he might have received from a corporation, if an action is thereafter brought against such corporation in said Circuit Court and a receiver appointed, the receiver can make an application or demand upon the attorney for the return of the money, although the same may have been paid eight or nine months previous thereto, and the Court could then make a summary order, saying to the attorney, "*You are an officer of the Court, and therefore I have summary power over you, you hand it back.*"

It is admitted at the time of the payment of this $2,000 (by check though it be) *no action or proceeding had been instituted in the Court below, no in-*

junction had been issued, and therefore plaintiff in error had an absolute right to accept the $2,000 as a retainer as counsel in an action in another jurisdiction.

As we contend, the authorities cited by the counsel for defendant in error and in the opinion of the Court below may be properly raised, if an action had been instituted by defendant in error against plaintiff in error to recover the amount, and in that event plaintiff in error would have been permitted to present to the Court and jury the issues and questions involved, leaving them to dispose of the question of fact, and the Court could rule upon any legal propositions submitted.

We respectfully submit, however, a dangerous precedent would be established by an affirmance of this judgment or decree, where an attorney receives a fee from a corporation, as in this case, where no action is instituted or receiver appointed in this jurisdiction, and proceeds to render valuable services to such corporation, and an action is thereafter instituted and receivers appointed, he is amenable to summary proceedings, because he happens to be a member of the bar of the court in which such action is brought and receivers appointed.

Plaintiff in error *was not an officer of the corporation or its regularly retained counsel; he never had any dealings with the corporation before he was retained as counsel to protect its interests in the First Circuit*, where receivers had been appointed *ex parte* and without notice; he had an absolute right to insist upon the payment of a retainer to cover not only his counsel fee but disbursements to Boston, Mass., and return, before he was required to render any services or incur expenses by way of railroad fare, &c.

We respectfully contend the learned Court below had no power in summary proceedings to deprive plaintiff in error of that amount, without giving him an opportunity of having the claim of adverse

possession as between the Receiver and himself tried before the Court and jury.

There is no evidence presented by defendant in error, nor is it claimed that at the time plaintiff in error received the check, there was any action pending, any injunction issued or receivers appointed. Therefore plaintiff in error could not be charged with knowledge that perhaps that at some future time an action would be commenced, injunction issued and receivers appointed, which would be necessary to enable defendant in error to sustain his proposition, that under the authorities cited, a person who has knowledge of the issuing of an injunction is bound thereby, although he had never been served.

The evidence presented by this record is overwhelming, that every precaution was taken to ascertain if any action had been brought, injunction issued or receivers appointed, and when it was ascertained that such was not the case, *then and then only did* plaintiff in error accept the retainer by way of check, which he endorsed to Mr. Donnelly, who had the same cashed and handed the money to plaintiff in error.

Respectfully submitted,

ALBERT I. SIRE,
Counsel for Plaintiff in Error.

United States Supreme Court.

No. 135. October Term, 1907.

FRANKLIN BIEN,

Plaintiff in Error,

against

BEVERLY R. ROBINSON, Receiver of the Property and Assets of the Haight & Freese Company,

Defendant in Error.

(No. 20,423.)

BRIEF OF DEFENDANT IN ERROR.

FREDERICK J. MOSES,
G. THOMAS DUNLOP,
Of Counsel for Defendant in Error.

Evening Post Job Printing Office, 156 Fulton St., New York.

Supreme Court of the United States,

OCTOBER TERM, 1907.

FRANKLIN BIEN, Plaintiff in Error, AGAINST BEVERLEY R. ROBINSON, Receiver of the Property and Assets of the Haight & Freese Company, Defendant in Error.	No. 135.

BRIEF OF DEFENDANT IN ERROR.

Statement of Facts.

The facts are neither fully nor accurately stated in the brief of the plaintiff in error, although there is in the record no conflict between the statements of fact contained in the papers submitted by the parties in the court below.

The order sought to be reviewed here, requires Franklin Bien, the plaintiff in error, to pay over to the receivers of the Haight & Freese Company two thousand dollars and interest, the same being the proceeds of a check of the Haight & Freese Company which was delivered to Mr. Bien *before* the appointment of the receivers, but which he procured to be certified and cashed *after* the appointment of the receivers, and after the delivery to him of the order appointing the receivers and enjoining any

disposition of the property of the corporation. The order directing him to pay over the money was granted upon that ground, as appears by the opinion of Lacombe, *J.* (pp. 36, 37 and 38).

The defendant in error is content to rest his case here, as he did in the court below, upon the affidavits submitted by the plaintiff in error (pp. 29–36).

These affidavits show that on the morning of May 9th, 1905, Mr. Bien was informed by Mr. Sire that a receiver had been appointed in Massachusetts; that the Seaboard Bank had refused to honor the checks of the defendant Haight & Freese Company; that Mr. Bien was informed by counsel for the Seaboard Bank that a receiver would be appointed in this jurisdiction; that he was requested by Mr. Sire to act generally in connection with this litigation; that he told Harvey Watson that he "would require a retainer of two thousand dollars"; that he asked Watson if he had been served with any papers showing the appointment of a receiver in this jurisdiction, and was informed that none had been served, that inquiry at the Clerk's office disclosed the fact that no proceeding had yet been instituted and no receiver appointed in this jurisdiction.

The delivery of the check is described in Mr. Bien's affidavit as follows (fol. 65, p. 30): "I then *accepted the check* drawn by Mr. Watson, and prepared to arrange my matters so I could leave for Boston and take such proceedings there as might be necessary to protect the defendant."

(Fol. 66.) "At the time I received the two thousand dollars from the defendant corporation no suit had been instituted in this jurisdiction, receiver appointed or injunction issued, so far as I could ascertain. I was very particular to ascertain this fact before *accepting said check*, and there was no obstacle in the way of my receiving it."

Mr. Sire's affidavit states (fols. 69–70) the preliminaries in substantially the same way as Mr. Bien's, and then says: "Mr. Bien requested a retainer of

two thousand dollars and I sent for Harvey Watson * * * and advised him to pay the same. Before *accepting any check* Mr. Bien requested me to * * * ascertain whether any action had been instituted, injunction issued or receiver appointed of defendant corporation." That the inquiry showed that no suit had been instituted.

"Thereupon I directed Mr. Watson *to make out a check* to the order of Mr. Bien for two thousand dollars, and instructed Mr. Bien to get ready to proceed to Boston for the purpose of protecting the interests of the defendant corporation" (fol. 70).

The affidavit of Siegelstein (pp. 33-4) shows that he inquired whether a receiver had been appointed, that he reported the result of his investigation and (fol. 75) that "Mr. Bien thereupon *received a check* for two thousand dollars from Mr. Harvey Watson as his retainer in the Haight and Freese matter."

The affidavit of Watson (pp 32-3, fol. 72) shows that "Mr. Bien asked for a retainer of two thousand dollars, which Mr. Sire stated was a reasonable amount to be paid. I thereupon stated, acting under Mr. Sire's advice, *I would give a check for the retainer.*" That the inquiry at the Clerk's office was made and reported. "Thereupon *I gave Mr. Bien a check* to his order for two thousand dollars."

It will be observed that the affidavit of each of the four persons who were present when the check was delivered was submitted by Mr. Bien, and that there is not one word in any of these affidavits which in any way indicates or from which it can be inferred that there was at the time of the delivery of the check any agreement to assign any part of the money on deposit to the credit of the Haight & Freese Company in the Colonial Bank, or that the check was drawn against any special fund, or that there was any understanding or agreement between the parties that it should be a charge upon any particular or specific fund.

These affidavits show that several hours after the delivery of the check and presumably on the same

day, Mr. Bien was informed that a receiver had been appointed in this jurisdiction, that the papers were turned over to him and that since that time he has acted as counsel for the defendant corporation.

Watson's affidavit (fol. 74) shows that several hours after the delivery of the check he was served with papers *which he turned over to Mr. Bien*. The affidavit of Maloney attached to the moving papers (fol. 58) shows that the paper served upon Watson was a certified copy of the order appointing the receiver.

Mr. Bien's replying affidavit shows that on the following morning, May 10th, he had the check certified, endorsed it and had it cashed.

The statement contained in the plaintiff's brief under Point 2, that James D. Colt, Receiver, is not a party to the proceeding is erroneous. The motion to compel the plaintiff to pay over the money was not brought on upon the notice printed in the brief. The motion was made upon the petition of James D. Colt and Beverly R. Robinson, Receivers (pp. 23 and 24), verified by Robinson, and signed by the solicitors for both Receivers, and upon this petition and the affidavits accompanying it, order to show cause (p. 22) was made, requiring Mr. Bien to show cause why the money should not be paid over. Upon that order, the motion was brought on for hearing before the Circuit Court.

If there be any defect in the record because of the absence of the Receiver Colt as a party, it is only because the plaintiff in error has failed to make him a party in this Court. Since the filing of the writ of error, the Receiver Colt has resigned.

The plaintiff in error in his brief relies upon two assignments of error; first, want of jurisdiction in the Circuit Court, and second, an alleged violation of the Constitution of the United States by denial to the plaintiff in error of a jury trial, and depriving him of his property without due process of law.

POINT I.

The Circuit Court had jurisdiction, and the plaintiff in error in this proceeding is not at liberty to question that jurisdiction.

The claim of lack of jurisdiction is based upon an objection to the original order appointing the Receivers. The contention of the plaintiff in error being that the Court had not jurisdiction to appoint the Receivers *ex parte*, and that consequently all subsequent proceedings are void. Although the order appointing the Receivers was made May 9, 1905, no attempt has been made to review that order, either in the Circuit Court of Appeals or in this Court. The suit in which the order was made has proceeded to judgment, and the receivership has been made permanent. The suit in which these Receivers were appointed was ancillary to the suit of Weiss against the Haight & Freese Company, in the Circuit Court for the District of Massachusetts, in which James D. Colt was appointed Receiver of the property of the defendant by an *ex parte* order. A final decree in that suit was entered and was affirmed by the Circuit Court of Appeals, First Circuit, and an application made to this Court for a writ of *certiorari* to review the decision of the Circuit Court of Appeals, which was denied at this Term of this Court. The same question as to the jurisdiction of the Court was raised in that suit, and was passed upon by the Circuit Court of Appeals, and this Court has declined to review their decision.

Even if the question were open to discussion, the Haight & Freese Company has acquiesced in the appointment of the Receivers *ex parte* by taking no steps to review or vacate the order by which the Receivers were appointed, and it is not open to collateral attack by the plaintiff in error in this proceeding.

POINT II.

No constitutional right of the plaintiff in error has been violated.

(*a.*) THE DELIVERY OF THE CHECK TO MR. BIEN DID NOT OPERATE AS AN ASSIGNMENT PRO TANTO OF THE MONEYS ON DEPOSIT IN THE COLONIAL BANK, AND VESTED IN HIM NO RIGHT OR TITLE TO THE MONEY.

The law is well settled that the making and delivery of a check does not operate as an assignment, legal or equitable, of any part of the deposit in the bank against which the check is drawn until it is accepted or certified by the bank.

Florence Mining Co. *vs.* Brown, 124 U. S., 385.

Attorney General *vs.* Continental Life Ins. Co., 71 N. Y., 325.

First National Bank *vs.* Clark, 134 N. Y., 368.

U. S. *vs.* Green, 136 Fed. Rep., 619, pp. 645-6.

The Florence Mining Company case involved a check given by a corporation shortly before the appointment of a receiver. The payee contended that it operated as an equitable assignment.

The Court, after discussing the question involved, concluded its opinion as follows, page 391:

> "An order to pay a particular sum out of a special fund cannot be treated as an equitable assignment *pro tanto* unless accompanied by such a relinquishment of control over the sum designated that the fundholder can safely pay it, and be compelled to do so, though forbidden by the drawer. A general deposit in a bank is so much money to the depositor's credit; it is a debt to him by the bank, payable on demand to his order, not property capable of identification and specific appro-

priation. A check upon the bank in the usual form, not accepted or certified by its cashier to be good, does not constitute a transfer of any money to the credit of the holder; it is simply an order which may be countermanded, and payment forbidden by the drawer at any time before it is actually cashed. It creates no lien on the money, which the holder can enforce against the bank. *It does not of itself operate as an equitable assignment.*"

The leading case in New York on this subject is

Attorney-General *v.* Continental Life Insurance Co. (*supra*),

which is quoted with approval by the Supreme Court of the United States, in

Fourth Street Bank *vs.* Yardley, 165 U. S., 634.

It involved a check given by a life insurance company in payment of a death loss shortly before the appointment of a receiver. The Court said, pages 327–329:

"It is claimed that the check operated as an equitable assignment of the fund deposited, *pro tanto*, and the Special and General Term below so held, and granted an order directing the Receiver to pay over the money to the petitioner, from which order the Receiver appealed to this Court.

I have examined the point with some care, and *with a disposition to affirm the order*, if it could be done consistently with the rules of law, *but I am unable to do it.*"

After discussing various authorities the Court continues as follows, pages 330, 331:

"Lunt *v.* Bank of North America (49 Barb., 221), declares the rule accurately, that checks drawn in the ordinary form, not describing any particular fund, or using any words of transfer of the whole or any part of any amount standing to the credit of the drawer,

but containing only the usual request, are of the same legal effect as an inland bill of exchange, and do not amount to an assignment of the funds of the drawer in the bank. This I believe to be settled law of this State, as it has been repeatedly affirmed in this Court (60 N. Y., 153; 48 *Id.*, 682; 57 *Id.*, 270, 459; 46 *Id.*, 82). This doctrine accords with the relations between the parties. Banks are debtors to their customers for the amount of deposits. A check is a request of the customer to pay the whole or a portion of such indebtedness to the bearer, or to the order of the payee. *Until presented and accepted, it is inchoate; it vests no title or interest, legal or equitable, in the payee of the fund.*"

* * * * *

"A statement of the consideration for a draft or check, either generally or specifically, whether on the back or in the body of the instrument, does not affect its negotiability; and if it did, it would not create a lien or appropriation of the particular fund without some expression to that effect, or an acceptance by the drawee."

The rule laid down in the two cases above quoted has been held not to apply where at the time of the delivery of the check an assignment *pro tanto* is made of the deposit against which the check is drawn, even though that assignment be by parol, or where the evidence clearly establishes that at the time of the delivery of the check there was a contract by which a special fund was appropriated to the payment of the check.

Fourth Street Bank *vs.* Yardley, 165 U. S., 634,

s the leading case on the subject. The Court at the opening of its opinion reaffirms the doctrine of the Florence Mining Company case, and in an exhaustive opinion discusses the authorities in which the qualifications of that rule are laid down.

In that case, the Keystone Bank was on the verge

of insolvency, and one of its officers went to the Fourth Street Bank, stated that the Keystone Bank would be unable to meet its Clearing House obligations unless it could raise $25,000 immediately, and stated that the Keystone Bank had on deposit with a bank in New York a special reserve fund of between twenty-six and twenty-seven thousand dollars. The Fourth Street Bank at the solicitation of the Keystone, and without the possibility of any gain or advantage to itself, delivered to the Keystone Bank $25,000 in gold certificates in exchange for a draft on the New York bank upon the distinct understanding that the deposit in the New York bank was appropriated to the payment of the draft.

The Court held that this was not an ordinary transaction between banks, and that the evidence showed that it was the understanding and agreement of the parties that the money advanced by the Fourth Street Bank should be a charge on and be satisfied out of a specified fund, and therefore held that the draft operated as an equitable assignment.

In the case at bar, however, there is not a scintilla of evidence from which any such agreement or understanding can be inferred.

The opinion in the Fourth Street Bank case contains an exhaustive and careful review of the authorities, and the cases above quoted are cited with approval. It is evident from the whole tenor of the opinion that the Court considered that, in order to take such a case out of the rule laid down in Florence Mining Company against Brown, the evidence showing the parol contract must be clear and convincing.

Among the cases quoted is (p. 649) Thompson *vs.* Simpson, L. R., 5 Ch., 659:

> "It is extravagant that a man who has an agent employed to pay bills creates a charge on the funds in the agent's hands by the mere drawing of a bill. *It is necessary to make out a contract to charge specific funds* which

> were with the Liverpool Bank or which were on their road thither; for if there was only a personal contract that would give nothing but a right of action.' In the same case, Lord Justice James said that 'when it is attempted to make out in addition to the written contract contained in a bill of exchange, a collateral parol agreement, it is most important to have clear and satisfactory evidence as to the exact words used.'"

The delivery of the check to Mr. Bien did not operate as an assignment of the fund, and, as stated by the Court of Appeals in

> Attorney General *vs.* Continental Life Ins. Co., 71 N. Y., at page 331,

until presented and accepted it was inchoate and vested in him no title or interest, legal or equitable, in the fund.

(*b.*) MR. BIEN WAS GUILTY OF A CONTEMPT OF COURT IN PRESENTING THE CHECK FOR CERTIFICATION AND IN HAVING THE SAME CASHED.

The affidavits show that on May 9, 1905, a certified copy of the order appointing the Receiver was delivered to Mr. Bien by Watson, and that order enjoined and restrained "the defendant Haight & Freese Company, its officers, agents, servants and assigns * * * and all other persons and corporations that may have in their possession and control any property, effects or credits belonging to the said Haight & Freese Company or standing in its name * * * from paying over or transferring any of the said money, property, effects or assets to any person other than said receivers * * * and they and each of them are hereby directed to deliver up the same to the said receivers forthwith."

Mr. Bien had been employed as counsel for the Haight & Freese Company; he was its agent and servant. He claims to have been its assign, so he comes within the specific language of the injunction order. Moreover, Mr. Bien is a member of the bar

of this Court, and having in his possession a certified copy of an order enjoining the Colonial Bank from paying over any of the moneys on deposit to the credit of the Haight & Freese Company, he procured that bank, which presumably had not notice of the making of the order, to certify a check and later to pay it out of those moneys.

Mr. Bien cannot set up as an excuse for his failure to obey the order the fact that the order was not personally served upon him by the complainant or the Receivers.

The courts have repeatedly held that a person violating an injunction, with notice of its issuance, is guilty of contempt.

In

Hull *vs.* Thomas, 3 Edwards Ch., 236,

the Court directed the entry of an order for a receiver and an injunction, but before the injunction or order was served, a person who had been in court told the defendants of the order, and they disposed of promissory notes which were the subject of the injunction and receivership. The Court (p. 238), after reviewing the English authorities on the subject, said:

> "These parties acted contrary to the order which the Court pronounced, after they had been told of it by the defendant James G. Wilson. They realized money upon the notes in order to defeat the object of the order. They must be adjudged guilty of a contempt."

In

Abell *vs.* N. Y. L. and W. R. R. Co., 18 Weekly Digest, 554,

affirmed by the Court of Appeals without opinion in 100 N. Y., 634, it was held that a contempt had been committed by the violation of an injunction, although not served, the attorneys having notice.

In

Koehler *vs.* The Bank, 6 N. Y. Supp., 470,

affirmed by the Court of Appeals without opinion in 117 N. Y., 661, an attorney was fined for contempt of Court in violating an injunction of which he had notice, although it had not been personally served upon him.

In

Hatch *vs.* Chicago, &c., Ry. Co., 6 Blatchford, 105, Federal cases No. 6204,

BLATCHFORD, *J.*, uses the following language:

> "The injunctions prayed for and the injunctions issued, if issued against the company alone and served on any director or on the treasurer would bind the person so served to obedience, and, even without such service, knowledge by the officer of the existence of the injunction against the company would bind the officer to obedience (citing People *vs.* Sturtevant, 9 N. Y., 263-7).

The deposit of the Haight & Freese Company with the Colonial Bank, so far as appears, was a general deposit, not impressed with any trust. It was a mere debt owing from the bank to the company, payable on demand, and constituted merely a chose in action against the bank.

The effect upon choses in action of the appointment of a receiver is stated by the Supreme Court in

Porter *vs.* Sabin, 149 U. S., 473, 480.

> "The whole property of the corporation within the jurisdiction of the Court which appointed the Receiver, *including all its rights of action*, except so far as already lawfully disposed of under orders of that court, remains in its custody to be administered and distributed by it."

By the certification of the check, the bank accepted it and contracted with the holder to pay it. The certification operated as a transfer *pro tanto* of the chose in action which belonged to the Haight and Freese Company to the holder of the check, and was a direct violation of the injunction order.

It was a direct, flagrant and intentional contempt of this Court, and is aggravated by the fact that Mr. Bien is a member of the bar and an officer of the Court, who cannot plead in extenuation ignorance of either the law or the facts.

By permitting him to purge himself of that contempt by paying over to the Receivers the proceeds of the check with interest the Court dealt with him most leniently and justice was tempered with mercy.

(*c.*) THE CLAIM ON MR. BIEN IS NOT ADVERSE TO THAT OF THE RECEIVERS WITHIN THE MEANING OF THE CASES CITED UPON THE BRIEF OF THE PLAINTIFF IN ERROR.

In all these cases and in all similar cases, the controversy arose between the receiver and a person who at the time of the appointment of the receiver was in possession of the property in controversy, claiming an interest in the property adverse to that of the receiver.

In the case at bar, Mr. Bien, counsel for the Haight & Freese Company, with knowledge of the order appointing the Receivers and enjoining all persons from making any disposition of the property of the corporation, procured the payment to himself of moneys belonging to the corporation which were constructively in the possession of the Receivers and which both he and the bank were specifically enjoined from paying to any person other than the Receivers. In procuring the payment to himself of this money, Mr. Bien was guilty of contempt of Court; the Court not only had power to compel

restitution, but might also have punished Mr. Bien by fine or imprisonment or both.

The claim that Mr. Bien was entitled to a jury trial is frivolous.

It is well settled that a party, who like the plaintiff in error here, has taken property from the possession of a receiver, or has violated an injunction, can be proceeded against summarily, in the suit in which the receiver was appointed, or the injunction issued.

In re Tyler, 149 U. S., 164.
Remington P. Co. *v.* Louisiana P. & Pub. Co., 56 Fed. R., 287.
Angel *v.* Smith, 9 Vesey, 635.
Lake Shore & M. S. Ry. Co. *vs.* Felton (C. C. A.), 103 Fed. R., 227.
Bardes *v.* Hawarden First National Bank, 175 U. S., 526.

A party who has actual knowledge of the issuance of an injunction may be punished for disobedience to the same, although he has not been served with a copy of the writ or order.

Ex parte Lennon, 64 Fed. R., 320; s. c., aff'd, 166 U. S., 548.
In re Krinsky, 112 Fed. R., 972.

A person, not a party to a suit, who was a party to the violation of an injunction, may be punished for a contempt.

Ex parte Lennon, 64 Fed. R., 320; s. c., 166 U. S., 548.
W. B. Conkey Co. *v.* Russell, 111 Fed. R., 417.

An attorney may be summarily ordered to pay over money which he has received in his official capacity. And he is not entitled to insist upon a plenary suit for this purpose, nor has he any right to a trial by jury.

In re Paschal, 11 Wallace, 483.
Jeffries *v.* Laurie, 27 Fed. R., 195.

The same rule applies to any other officer of the Court.

In re Pitman, 1 Curtis, 186.
Bagley *v.* Yates, 3 McLean, 465.
The Laurens, 1 Abbott Adm., 508.

POINT III.

The writ should be dismissed, with costs.

FREDERICK J. MOSES,
G. THOMAS DUNLOP,
Of Counsel for Receiver Robinson Defendant in Error.

FILED.
MAR 6 1907
JAMES H. McKENNEY,
CLERK

135.

Supreme Court of the United States.

No. [redacted] OF OCTOBER TERM, 1906.

FRANKLIN BIEN,

Plaintiff in Error,

against

BEVERLY R. ROBINSON, RECEIVER OF THE PROPERTY AND ASSETS OF THE HAIGHT & FREESE COMPANY,

Defendant in Error.

(20,423.)

Motion to Dismiss or Affirm, Notice and Affidavit.

ROGER FOSTER,
FREDERICK J. MOSES,
Of Counsel for Defendant in Error.

Supreme Court of the United States. 1

FRANKLIN BIEN, Plaintiff in Error. AGAINST BEVERLY R. ROBINSON, Receiver of the Property and Assets of the Haight & Freese Company, Defendant in Error. (20,423.)	No. 458 of October Term 1906.

2

And now comes Beverly R. Robinson, one of the receivers of the property and assets of the Haight & Freese Company, who is the defendant in error, by Roger Foster and Frederick J. Moses, his attorneys, solicitors and counsel, and he moves to dismiss and quash with costs, upon the transcript of the record herein and upon the affidavit of Roger Foster, sworn to March 2d, 1907, the paper which purports to be a writ of error herein, which was dated June 16th, 1906, and all proceedings under color of the same, for want of jurisdiction, 3
and because the said paper purporting to be a writ of error is otherwise informal, irregular and insufficient; for the reason that the order, which the said paper purporting to be a writ of error seeks to bring up for review, was made and entered in a suit in equity and was not made in any action at common law; and for the reason that the said order is an interlocutory order in a suit in equity, which

suit has not yet been determined, and said order is not a final order and is not appealable; and for the reason that James D. Colt, who is one of the receivers of the said property and assets of the said Haight & Freese Company, and who is a joint and co-receiver with the said defendant in error, has not been made a party to the said paper purporting to be a writ of error, nor to the proceedings to review said order; that he is not named in the said paper purporting to be a writ of error, and that he is not named in the citation issued thereunder, and that the said James D. Colt has not been served with the said paper purporting to be a writ of error, and that the said James D. Colt has not been served with the citation thereunder; and for the reason that the said paper purporting to be a writ of error, and the proceedings thereunder, is and are, otherwise informal, irregular and insufficient. And the said Beverly R. Robinson, who is one of the receivers of the property and assets of the Haight & Freese Company, and who is the defendant in error, unites with said motion to dismiss, a motion to affirm the order of the Circuit Court of the United States for the Southern District of New York, dated and filed May 29th, 1906, which the said paper purporting to be a writ of error attempts to bring up for review; and also a motion for such other and further relief in the premises as may be just.

This motion is made upon the transcript of the record herein, filed October 16th, 1906, and upon the affidavit of Roger Foster, sworn to March 2d, 1907.

Roger Foster
Frederick J. Moses
Of Counsel for Defendant in Error.

SUPREME COURT OF THE UNITED STATES. 7

FRANKLIN BIEN, Plaintiff in Error, AGAINST BEVERLEY R. ROBINSON, Receiver of the Property and Assets of the Haight & Freese Company, Defendant in Error. (20,423.)	No. 458 of October Term 1906.

8

SIR:

Please take notice: That upon the transcript of the record herein, and upon the affidavit of Roger Foster, hereto annexed, sworn to March 2d, 1907, and upon the printed brief, a copy of which is herewith served upon you, we shall, on Monday the 18th day of March, 1907, or if motions are not then heard, at the next succeeding motion day of this Court, make and submit to the Supreme Court of the United States, at a stated Term thereof, to 9 be held in the Capitol, in the City of Washington, District of Columbia, the motion, a copy of which is hereto annexed; and that we shall then and there move said Court for an order, dismissing the papers which purport to be the writ of error herein and all proceedings under color of the same upon the grounds stated in said motion; and that we shall then and there also move for an order affirming the order of the Circuit Court of the United States for the Southern District of New York, dated and filed May 29th, 1906, which the said paper purporting to be a writ of error attempts to bring up

for review; and for such other and further relief in the pemises as may be just.

Yours, &c.,
ROGER FOSTER,
FREDERICK J. MOSES,
Attorneys, Solicitors and Counsel for Beverly R. Robinson, one of the Receivers of the property and assets of the Haight & Freese Company.

To ALBERT I. SIRE, Esq.,
Attorney, Solicitor and Counsel for Franklin Bien, plaintiff in error, 99 Nassau St., New York.

SUPREME COURT OF THE UNITED STATES.

FRANKLIN BIEN,
Plaintiff in Error,

AGAINST

BEVERLY R. ROBINSON, Receiver of the Property and Assets of the Haight & Freese Company,
Defendant in Error.
(20,423.)

No. 458 of October Term, 1906.

STATE OF NEW YORK, }
County of New York, } ss.:

ROGER FOSTER, being duly sworn, deposes and says: I reside in the County and State of New York, and I am a member of the bar of said county,

of the Circuit Court of the United States for the 13
Southern District of New York, and of this Court.

On May 9, 1905, in a suit in equity by Ridgway Bowker against Haight & Freese Company, the Seaboard National Bank, the Consolidated National Bank, the Produce Exchange Safe Deposit & Storage Company, John Doe and Richard Roe; James D. Colt, Esq., and Walter D. Edmonds, Esq., were appointed receivers of the said defendant Haight & Freese Company by the Circuit Court of the United States for the Southern District of New York. A copy of the said order is contained in the printed transcript of the record herein, at pages 2, 3 and 4. Subsequently, the said Edmonds re- 14
signed his receivership because of ill health, and on or about May 10, 1905, a second order in said cause was made by said Court, which appointed Beverly Randolph Robinson, Esq., receiver of the said corporation, with the said J. D. Colt as aforesaid, in place and stead of said Edmonds. A copy of said second order is contained in said printed transcript at pages 19, 20, 21 and 22. Previous to the motion for the order herein sought to be brought up for review by this Court, both the said Colt and the said Robinson duly qualified as such receivers and they respectively executed and filed the bonds required of them by said Circuit Court, and each of their said bonds was duly approved by 15
said Circuit Court. Since their qualification, they have acted as joint receivers of the property and assets of the said corporation in the Southern District of New York. I have acted as solicitor, attorney and counsel for the said J. D. Colt, as receiver as aforesaid, since his said appointment of May 9, 1905. I also acted as solicitor, attorney and counsel for said Edmonds, as receiver as aforesaid, from his appointment until his resignation. I had never met said Robinson before his said appointment; and throughout his receivership

16 he has been represented by another attorney, solicitor and counsel, Frederick J. Moses, Esq. I have never acted for him alone until this motion was prepared except on the first two days of his receivership.

The said Colt joined in the petition for the order of the said Circuit Court, which is sought to be brought up for review herein. The said petition is contained in said printed transcript at pages 23 and 24. It expressly described itself as "the petition of James D. Colt and Beverly R. Robinson, as receivers of the property of the defendant Haight & Freese Company." Said peti-
17 tion was signed by me as solicitor for Receiver Colt. I attended on his behalf upon the argument of the said motion. An affidavit made by him, which is to be found at page 28 of said printed transcript, was submitted to the Court upon said argument, and is recited in the order sought to be brought up for review. No citation herein, and no copy of the paper which purports to be a writ of error herein, and no copy of any of the papers connected with said writ of error, and no copy of any one of said papers, and no copy of any of said papers, has been served upon the said James D. Colt; and no one of said papers has been served upon me as solicitor for said James D. Colt. No
18 summons has been served nor severance has been made herein.

On or about June 25th, 1906, I wrote and sent to Mr. Franklin Bien, a letter, of which a copy is hereto annexed marked A, requesting him to serve a copy of the citation upon me for Receiver Colt. The said Mr. Bien answered, in a letter which I have lost, in which letter he refused to serve me with any of said papers and insisted that neither said Colt nor myself had any right to appear in the proceedings in error herein. Subsequently, I wrote and sent him on or about

December 8th, 1906, a letter, a copy of which is hereto annexed marked B. The said Mr. Bien has failed to answer said last letter. 19

The order which the said paper purporting to be a writ of error seeks to bring up for review was made in a suit in equity. It was not made in any action at common law.

The suit in equity in which said order was made is still pending in said Circuit Court undetermined, and no final decree has yet been made therein. No action at common law between the said parties is pending.

ROGER FOSTER.

Sworn to before me this 2d day of March, 1907. 20

"B. B. Higgins"

[NOTARIAL SEAL.] Notary Public, New York County.

A.

HAIGHT & FREESE CO.

BOWKER. JUNE 25TH, 1906.

DEAR MR. BIEN:

Neither Receiver Colt nor myself has been served with a citation upon any writ of error or appeal taken by you to the Supreme Court of the United States; although I have been informed that you have taken an appeal or writ of error to review an order affecting Beers & Owens; and also one to review the order directing you to pay $2,000 to the receivers. In the latter case at least, Mr. Colt was a party to the application, his affidavit was used thereupon, and I attended upon the argument. I believe also that I signed the original motion papers or petition on his behalf. Unless you serve me with a citation in the latter proceeding, I shall advise that a motion be made to dismiss the same, because of your failure so to serve me. 21

22 I am willing to accept service of a citation on behalf of Receiver Colt, without prejudice, however, to any right I may have had on his behalf to move to dismiss your appeal or writ of error upon any other grounds than the failure to make my client a party to the same.

I remain,
Very truly yours,
ROGER FOSTER.

FRANKLIN BIEN, Esq.,
5 Beekman Street,
New York.

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23 **B.**

HAIGHT & FREESE CO.

DEC. 8TH, 1906.

BOWKER.

DEAR MR. BIEN:

Your favor of the 8th inst. received, for which thanks. If you will procure a satisfactory stipulation for the adjournment of the hearing upon the claim by Mr. Turner to certain assets of Haight & Freese Company, which I understand is set down for December 12th in Philadelphia, there will be no difficulty about the adjournment of Harvey Watson's examination. I presume that you will
24 consent to this.

Will you kindly send me a copy of your letter in which you refused to make Mr. Colt a party to your case in the Supreme Court of the United States?

I have mislaid my copy.

I remain,
Very truly yours,
ROGER FOSTER.

FRANKLIN BIEN, Esq.,
5 Beekman Street,
New York.

(X2547)

Office Supreme Court, U. S.
FILED.
MAR 6 1907
JAMES H. McKENNEY,
CLERK.

135.

Supreme Court of the United States.

No. [redacted] OF OCTOBER TERM, 1906.

FRANKLIN BIEN,

Plaintiff in Error,

against

BEVERLY R. ROBINSON, RECEIVER OF THE PROPERTY AND ASSETS OF THE HAIGHT & FREESE COMPANY,

Defendant in Error.

(20,423.)

Brief for Defendant in Error upon Motion to Dismiss or Affirm.

ROGER FOSTER,
FREDERICK J. MOSES,
Of Counsel for Defendant in Error.

EVENING POST JOB PRINTING OFFICE, NEW YORK

Supreme Court of the United States,

OCTOBER TERM, 1906.

FRANKLIN BIEN, Plaintiff in Error, AGAINST BEVERLY R. ROBINSON, Receiver of the Property and Assets of the Haight & Freese Company, Defendant in Error. (20,423.)	No. 458.

Brief for Defendant in Error upon Motion to Dismiss or Affirm.

Statement.

This is a motion to dismiss or to affirm a writ of error, which seeks to bring up for review an order entered in a suit in equity, still pending undetermined in the Circuit Court of the United States for the Southern District of New York. That order directs that Franklin Bien, an attorney for one of the defendants below, pay to the Receivers of the Haight & Freese Company, the sum of $2,000 (p. 38). The assignment of errors sets up and alleges a want of

jurisdiction in the Circuit Court and also an alleged violation of the Constitution of the United States, by the denial to the plaintiff in error of a jury trial and by depriving him of property without due process of law.

The facts are as follows: On May 9th, 1905, Judge Lacombe appointed James D. Colt and Walter D. Edmonds, Receivers, "both original and as ancillary to" a decree of the Circuit Court of the United States for the District of Massachusetts, entered the day before, of all the property and assets of the defendant Haight & Freese Company. This order was granted upon a bill in equity, a certified copy of the decree in Massachusetts which appointed Mr. Colt Receiver of the corporation's assets there and certain affidavits (p. 2, fol. 4). The plaintiff in error has omitted from his transcript the bill; but he has included therein the affidavits. These show that the defendant was a New York corporation, incorporated to carry on the business of the purchase and sale of stocks, bonds, securities and commodities, upon commission, but actually engaged in what is known as keeping a bucket shop (pp. 4-19).

The certified copy of the decree in Massachusetts is also omitted from the transcript; but the fact of the appointment is recited in the order (p. 3, fol. 5), and corroborated by the affidavit of Mr. Maloney (p. 26, fol. 58).

The day after the original receivership, Mr. Edmonds resigned because of ill health; and on May 10th, 1905, a new order was made upon the same and other papers, which appointed Beverly Randolph Robinson co-receiver with Mr. Colt in Mr. Edmonds' place. Both Mr. Colt and Mr. Robinson have fully qualified as such receivers, and they are still employed in the administration of their trust (p. 25, fol. 54; p. 28, fol. 61). The first order, which was dated May 9th, 1905, contained the following clause: "It is hereby ordered, ad-

"judged and decreed, and I hereby order that "the said defendant, Haight & Freese Company, "its officers, agents, servants and assigns, and "the Seaboard National Bank, the Consolidated Na- "tional Bank, the Produce Exchange Safe Deposit "and Storage Company, John Doe and Richard "Roe, and all other persons and corporations that "may have in their possession and control any prop- "erty, effects or credits belonging to the said Haight "& Freese Company, or standing in its name or in "the name of William H. Lillis, George G. Turner, "Harvey Watson, Charles B. Poor, Junior, William "G. Conkling. ——— Beardsley, either as officers of "said defendant, or individually, be and they hereby "are enjoined and restrained and stayed until the "further order of this court from paying over or "transferring any of said money, property, effects, "or assets to any person other than said receivers, "and from permitting any person other than said "receivers to remove the contents of any safe de- "posit company box or vault or bank standing in "the name of said defendant, Haight & Freese Com- "pany, or in the names of either of the officers or "employees of the said above mentioned Haight & "Freese Company, or either of the above named "persons, and they and each of them are hereby di- "rected to deliver up the same to the said receivers "forthwith, and it is further ordered that either of "said receivers may take possession upon his quali- "fication without waiting for the qualification of "the other; and that no funds be removed from the "jurisdiction of this court, except upon a further "order of the court" (p. 3, fols. 6, 7). Mr. Edmonds duly qualified upon the same day and at four o'clock in the afternoon took possession of the office of the defendant, served a certified copy of this order upon Harvey Watson, the secretary and director thereof, and demanded of the latter, the immediate delivery of all the property and as-

sets of the company to him (pp. 26, 27, fol. 58; p. 23, fol. 50).

It appears by the affidavit of the plaintiff in error, Mr. Bien, who is a member of the bar, that on the morning of May 9th, 1905, he was informed by one of the attorneys for the defendant, that a receiver had been appointed in Massachusetts, and that the Seaboard National Bank, where the defendant had one of its bank accounts in New York, had received notice not to honor the checks of the defendant. He was retained as counsel and given a check of the company for $2,000 on account of his retainer (pp. 29, fols. 63-64). This check was drawn on the Colonial Bank of the City of New York, where the defendant had a bank account (p. 24).

The affidavit of Mr. Bien continues: "Several hours after that" on the same day, "I was informed a suit had been filed in this jurisdiction by Ridgway Bowker, the complainant herein, and an ancillary receiver appointed. *The papers were turned over to me.*" There were no papers served (Maloney, p. 27, fol. 58), except the order appointing the receiver, which contained the injunction against the payment or transfer of any money of the corporation by any one (p. 3, fol. 6). This statement of Mr. Bien, concerning his receipt of the papers on that day, is corroborated by the affidavit of Harvey Watson offered in behalf of Mr. Bien (p. 33, fol. 72).

The next day, with full knowledge of the injunction which forbade the bank from paying any money of the corporation to him or any one but the receivers (p. 3, fol. 6), Mr. Bien had the check (p. 24, fol. 52) certified; endorsed, and handed it to Mr. Donnelly, whom he asked to cash it (Donnelly, p. 35, fol. 78). It was cashed by a private bank where Donnelly had an account and he gave the money to Bien, who then went to Boston that afternoon (*Ibid.*, Bien, pp. 34, 35, fols. 76, 77). Later the

check was paid by the Colonial Bank (p. 24, fol. 52; p. 25, fol. 55).

The writ of error names only one of the receivers as defendant in error, namely, Mr. Robinson. The citation was served upon him alone. The plaintiff in error has expressly refused to serve a citation upon the other receiver, Mr. Colt, although the latter's counsel has offered to accept service thereof.

Another dilatory writ of error to a previous interlocutory order in the same case was dismissed by this court in *Haight & Freese Co.* v. *Robinson*, 203 U. S., 581.

POINT I.

The writ of error should be dismissed; for the reason that the order can only be reviewed by an appeal, and not by proceedings in error.

The order is an interlocutory order, entered in a suit in equity, and not in an action at law. Proceedings of that character can only be reviewed by an appeal, and not by a writ of error (*McCollum* v. *Eager*, 2 Howard, 61; *In re Morrissey*, 137 U. S., 157, 158; *In re Neagle*, 135 U. S., 1, 42; *Rice* v. *Ames*, 180 U. S., 371; *Files* v. *Brown* (C. C. A.) 124 Fed. R., 13) (an order denying a petition to set aside a sale by a receiver).

The learned counsel for the plaintiff in error is misled by the practice upon the review of judgments and decrees of State courts.

POINT II.

The order was interlocutory and not final. It consequently cannot be reviewed until after a final decree, which has not yet been entered.

That no final decree has been entered appears by the affidavit of Mr. Foster, in the motion papers (p. 7).

This is not an order directing the payment of money to a party, which may be dissipated by him, so that it cannot be recovered by a writ of restitution. It is an order directing the payment of money into Court, by its delivery to receivers. Such orders, this Court has uniformly held to be interlocutory, and not final nor reviewable before the final decree.

It has been expressly held that an order or decree directing the payment of money or the delivery of property to a receiver is not final nor appealable (*Forgay* v. *Conrcid*, 6 Howard, 201, 284; *Grant* v. *Phoenix Insurance Co.*, 106 U. S., 429, 432; *Lodge* v. *Twell*, 135 U. S., 232).

In *Grant* v. *Phoenix Insurance Co.*, 106 U. S., 429, 432, Mr. Chief Justice Waite said:

> "The reason is that the possession of the "receiver is that of the Court, and he holds "pending the suit, for the benefit of whomso- "ever it shall in the end be found to con- "cern."

It has been held that an order directing money to be paid into court cannot be reviewed before final decree, *Louisiana Bank* v. *Whitney*, 121 U. S., 284, and that an order directing trustees to pay money to an assignee in bankruptcy cannot be. *Pulliam* v. *Christian*, 6 Howard, 209.

POINT III.

The proceedings are defective because of the refusal of the plaintiff in error to make Receiver Colt a party to the proceedings.

Masterson v. *Herndon*, 10 Wall., 416; *Haight & Freese Co.*, v. *Robinson*, 203 U. S., 581.

The omission was intentional and has been called to the attention of the plaintiff in error by the counsel for Receiver Colt, who has hitherto appeared separately throughout all the proceedings. His refusal was based upon the frivolous contention that Mr. Colt was only an ancillary receiver; whereas, in fact, Mr. Colt's appointment was, and his powers are, coequal with those of Mr. Robinson. The object of the omission was to prevent the counsel for Receiver Colt, who was then not retained by Receiver Robinson, from taking part in the proceedings.

POINT IV.

Even if this were a final decree, the question raised is not one of jurisdiction.

The word "jurisdiction," when used in the Evarts Act, means "initial jurisdiction."

U. S. v. *Swan* (C. C. A.), 65 Fed. R., 647, 649, Taft, *J.*:

> "The first paragraph of that section was "intended to apply only to the initial ques- "tions of the jurisdiction of a United States "District or Circuit Court."

In *Bache* v. *Hunt*, 193 U. S., 523, *held:* that the question whether the Circuit Court had power in a collateral proceeding, at the foot of the decree, to determine a controversy between the receiver and a citizen and resident of another State, served at his residence out of the District, was not one of jurisdiction.

The question must be one involving the jurisdiction of the Circuit Court as a Federal Court, which does not arise here. (*Louisville Trust Co.* v. *Knott*, 191 U. S., 225, 233.)

The question whether a court of bankruptcy can proceed summarily against a party charged with holding property of the bankrupt is not one of jurisdiction. *Schwerer* v. *Brown*, 195 U. S., 171.

Moreover, this question cannot be certified by the Supreme Court, until after final judgment or decree. *McLish* v. *Roff*, 141 U. S., 661; *Bardes* v. *Hawarden First National Bank*, 175 U. S., 526.

It is well settled that a party, who like the plaintiff in error here, has taken property from the possession of a receiver, or has violated an injunction, can be proceeded against summarily, in the suit in which the receiver was appointed, or the injunction issued. *In re Tyler*, 149 U. S., 164; *Remington P. Co.* v. *Louisiana P. & Pub. Co.*, 56 Fed. R., 287; *Angel* v. *Smith*, 9 Vesey, 635; *Lake Shore & M. S. Ry. Co.* v. *Felton* (C. C. A.), 103 Fed. R., 227; *Bardes* v. *Hawarden First National Bank*, 175 U. S., 526.

POINT V.

The plaintiff in error was not entitled to a trial by jury, and the order was due process of law.

See *in re Tyler*, 149 U. S., 164; and cases cited in previous point.

A party who has actual knowledge of the issue of an injunction, may be punished for disobedience to the same although he has not been served with a copy of the writ or order. *Ex parte Lennon*, 64 Fed. R., 320; s. c., aff'd, 166 U. S., 548; *In re Krinsky*, 112 Fed. R., 972.

A person, not a party to a suit, who was a party to the violation of an injunction, may be punished for a contempt. *Ex parte Lennon*, 64 Fed. R., 320; s. c., 166 U. S., 548; *W. B. Conkey Co.* v. *Russell*, 111 Fed. R., 417.

An attorney may be summarily ordered to pay over money which he has received in his official capacity. And he is not entitled to insist upon a plenary suit for this purpose, nor has he any right to a trial by jury. *In re Paschal*, 11 Wallace, 483; *Jeffries* v. *Laurie*, 27 Fed. R., 195.

The same rule applies to any other officer of the Court. *In re Pitman*, 1 Curtis, 186; *Bagley* v. *Yates*, 3 McLean, 465; *The Laurens*, 1 Abbott Adm., 508.

POINT VI.

Since the constitutional question is frivolous, the other questions in the case cannot be reviewed.

Sloan v. *U. S.*, 193 U. S., 614; *Farrell* v. *O'Brien*, 199 U. S., 89.

POINT VII.

The delivery of the check to Mr. Bien did not operate as an assignment pro tanto of the moneys on deposit in the Colonial Bank, and vested in him no right or title to the money.

The law is well settled that the making and delivery of a check does not, until it is accepted or certified by the bank, operate as an assignment, legal or equitable, of any part of the deposit against which the check is drawn. *Florence Mining Co.* vs. *Brown*, 124 U. S., 385; *Attorney General* vs. *Continental Life Ins. Co.*, 71 N. Y., 325; *First National Bank* vs. *Clark*, 134 N. Y., 368; *U. S.* vs. *Green*, 136 Fed. R., 618, 645-646.

The Florence Mining Company's case (124 U. S., 385) involved a check given by a corporation shortly before the appointment of a receiver. The payee contended that it operated as an equitable assignment.

This Court, speaking through Mr. Justice Field, after discussing the question involved, concluded its opinion as follows:

> "An order to pay a particular sum out of "a special fund cannot be treated as an "equitable assignment *pro tanto* unless ac- "companied by such a relinquishment of con- "trol over the sum designated that the "fund holder can safely pay it, and be com- "pelled to do so, though forbidden by the "drawer. A general deposit in a bank is "so much money to the depositor's credit; it "is a debt to him by the bank, payable on "demand to his order, not property capable "of identification and specific appropriation.

> "A check upon the bank in the usual form, "not accepted or certified by its cashier to "be good, does not constitute a transfer of "any money to the credit of the holder; it is "simply an order which may be counter- "manded, and payment forbidden by the "drawer at any time before it is actually "cashed. It creates no lien on the money, "which the holder can enforce again at the "bank. *It does not of itself operate as an "equitable assignment.*"

Attorney General v. *Continental Life Insurance Co.* (71 N. Y., 325) is the leading New York case on this subject, and is quoted with approval by this Court in *Fourth Street Bank* vs. *Yardley*, 165 U. S., 634.

It involved a check given by a life insurance company, shortly before the appointment of a receiver, in payment of a death loss.

The New York Court of Appeals said, speaking through Chief Judge Church (391) (pp. 327-329):

> "It is claimed that the check operated as "an equitable assignment of the fund de- "posited, *pro tanto*, and the Special and "General Term below so held, and granted "an order directing the receiver to pay over "the money to the petitioner, from which or- "der the receiver appealed to this court.
>
> "I have examined the point with some "care, and *with a disposition to affirm the "order*, if it could be done consistently with "the rules of law, *but I am unable to do it.*"

After discussing various authorities the Court continues (pp. 330-331):

> "*Lunt* v. *Bank of North America* (49 "Barb., 221) declares the rule accurately, "that checks drawn in the ordinary form, not "describing any particular fund, or using "any words of transfer of the whole or any "part of any amount standing to the credit

"of the drawer, but containing only the "usual request, are of the same legal effect "as an inland bill of exchange, and do not "amount to an assignment of the funds of "the drawer in the bank. This I believe to be "the settled law of this State, as it has been "repeatedly affirmed in this court (60 N. Y., "153; 48 *Id.*, 682; 57 *Id.*, 270, 459; 46 *Id.*, "83). This doctrine accords with the rela- "tions between the parties. Banks are "debtors to their customers for the amount "of deposits. A check is a request of the cus- "tomer to pay the whole or a portion of such "indebtedness to the bearer, or to the order "of the payee. *Until presented and accepted "it is inchoate; it vests no title or interest, "legal or equitable, in the payee to the fund.*"

* * * * *

"A statement of the consideration for a draft "or check, either generally or specifically, "whether on the back or in the body of the "instrument, does not affect its negotiabil- "ity; and if it did, it would not create a lien "or appropriation of the particular fund "without some expression to that effect, or "an acceptance by the drawee."

The rule laid down in the two cases above quoted has been held not to apply where at the time of the delivery of the check an assignment *pro tanto* is made of the deposit against which the check is drawn, or where the evidence clearly establishes that at the time of the delivery of the check there was a contract by which a special fund was appropriated to the payment of the check.

Fourth Street Bank vs. *Yardley*, 165 U. S., 634, is the leading case on the subject. The Court at the opening of its opinion reaffirms the doctrine of the Florence Mining Company case, and exhaustively discusses the authorities in which the qualifications of the rule are laid down.

In that case, the Keystone Bank was on the verge of insolvency. One of its officers went to the

Fourth Street Bank and said that the Keystone Bank would be unable to meet its clearing-house obligations unless it could raise $25,000 immediately, and that it had on deposit with a bank in New York a special reserve fund of between twenty-six and twenty-seven thousand dollars. The Fourth Street Bank at the solicitation of the Keystone, and without the possibility of any gain or advantage to itself, delivered to the Keystone Bank $25,000 in gold certificates in exchange for a draft on the New York bank upon the distinct understanding that the deposit in the New York bank was appropriated to the payment of the draft.

This Court held, that this was not an ordinary transaction between banks, and that the evidence showed that it was the understanding and agreement of the parties that the money advanced by the Fourth Street Bank should be a charge on and be satisfied out of a specified fund, and therefore held that the draft operated as an equitable assignment.

In the case at bar, however, there is not a scintilla of evidence from which any such agreement or understanding can be inferred.

The opinion in the *Fourth Street Bank* case contains an exhaustive and careful review of the authorities, and the cases above quoted are cited with approval. It is evident from the whole tenor of the opinion that the Court considered that in order to take such a case out of the rule laid down in *Florence Mining Company* against *Brown*, the evidence showing the parol contract must be clear and convincing.

Among the cases quoted is (p. 649) *Thompson* vs. *Simpson*, L. R., 5 Ch., 659:

> "It is extravagant that a man who has an "agent employed to pay bills creates a "charge on the funds in the agent's hands by "the mere drawing of a bill: '*It is neces-* "*sary to make out a contract to charge*

> "*specific funds* which were with the Liver-
> "pool Bank or which were on their road
> "thither; for if there was only a personal
> "contract that would give nothing but a
> "right of action.' In the same case, Lord
> "Justice James said that 'when it is at-
> "'tempted to make out in addition to the
> "'written contract contained in a bill of ex-
> "'change, a collateral parol agreement, it
> "'is most important to have clear and satis-
> "'factory evidence as to the exact words
> "'used.'"

The delivery of the check to Mr. Bien did not operate as an assignment of the fund, and as said by the Court of Appeals in *Attorney General* vs. *Continental Life Ins. Co.*, 71 N. Y., 325, 331, until presented and accepted it was inchoate and vested in him no title or interest, legal or equitable in the fund.

POINT VIII.

Mr. Bien was guilty of a contempt of Court in presenting the check for certification and in having the same cashed.

The affidavits show that on May 9, 1905, a certified copy of the order appointing the receiver was delivered to Mr. Bien by Watson (Bien, p. 30, fol. 65; Sire, p. 32, fol. 70). That order enjoined and restrained "the defendant Haight and Freese Company, its officers, agents, servants and assigns * * * and all other persons and corporations that may have in their possession and control any property, effects or credits belonging to the said Haight and Freese Company or standing in its

name * * * from paying over or transferring any of the said money, property, effects or assets to any person other than said receivers * * * and they and each of them are hereby directed to deliver up the same to the said receivers forthwith" (p. 3, fol. 6).

Mr. Bien had been employed as counsel for the Haight and Freese Company (p. 29, fol. 63); he was its agent and servant. He claims to have been its assign. So, he comes within the specific language of the injunction order. Moreover, Mr. Bien is a member of the bar of the Circuit Court, and having in his possession a certified copy of an order enjoining the Colonial Bank from paying over any of the moneys on deposit to the credit of the Haight and Freese Company, he procured that bank, which presumably had no notice of the making of the order, to certify a check and later to pay it out of those moneys.

Mr. Bien cannot set up, as an excuse for his failure to obey the order, the fact that the order was not personally served upon him by the complainant or the receivers.

The courts have repeatedly held, that a person violating an injunction with notice of its issuance is guilty of contempt.

Ex parte Lennon, 64 Fed. R., 320; 166 U. S., 598.
In re Kirousky, 112 Fed. R., 972.

In *Hull* vs. *Thomas*, 3 Edwards Ch., 236, the court directed the entry of an order for a receiver and an injunction, but before the injunction or order was served, a person who had been in court told the defendants of the order, and they disposed of promissory notes which were the subject of the injunction and receivership. The court (page 238) after reviewing the English authorities on the subject said:

> "These parties acted contrary to the or-
> "der which the court pronounced, after they
> "had been told of it by the defendant James
> "G. Wilson. They realized money upon the
> "notes, in order to defeat the object of the
> "order. They must be adjudged guilty of a
> "contempt."

In *Abell* vs. *N. Y. L. and W. R. R. Co.*, 18 Weekly Digest, 554, affirmed by the Court of Appeals without opinion in 100 N. Y., 634, *held* that a contempt had been committed by the violation of an injunction, although not served, the attorneys having notice.

In *Koehler* vs. *The Bank*, 6 N. Y., Supp. 470, affirmed by the Court of Appeals without opinion in 117 N. Y., 661, an attorney was fined for contempt of court in violating an injunction of which he had notice, although it had not been personally served upon him.

In *Hatch* vs. *Chicago, &c., Ry Co.*, 6 Blatchford, 105, Federal Cases No. 6204, Blatchford, *J.*, used the following language:

> "The injunctions prayed for and the in-
> "junctions issued, if issued against the com-
> "pany alone, and served on any director, or
> "on the Treasurer, would bind the person so
> "served to obedience, and, even without such
> "service, knowledge by the officer of the ex-
> "istence of the injunction against the com-
> "pany, would bind the officer to obedience"
> (citing People *vs.* Sturtevant, 9 N. Y., 263-277).

The deposit of the Haight and Freese Company with the Colonial Bank so far as appears was a general deposit, not impressed with any trust. It was a mere debt owing from the bank to the company, payable on demand, and constituted merely a chose in action against the bank.

The effect upon choses in action of the appoint-

ment of a receiver is stated by this Court in *Porter* vs. *Sabin*, 149 U. S., 473, 480:

> "The whole property of the corporation "within the jurisdiction of the court which "appointed the receiver *including all its "rights of action*, except so far as already "lawfully disposed of under orders of that "court, remains in its custody to be adminis- "tered and distributed by it."

By the certification of the check, the bank accepted it and contracted with the holder to pay it. The certification operated as a transfer *pro tanto* of the chose in action, which belonged to the Haight and Freese Company, to the holder of the check, and its procurement was a direct violation of the injunction order.

It was a direct, flagrant and intentional contempt of the court, is aggravated by the fact that Mr. Bien is a member of the bar and an officer of the court, who cannot plead in extenuation ignorance of either the law or the facts.

By permitting him to purge himself of that contempt by paying over to the receivers the proceeds of the check with interest, the Court treated him most leniently, and justice was tempered with mercy.

POINT IX.

The writ should be dismissed, with costs.

ROGER FOSTER,
FREDERICK J. MOSES,
Of Counsel for Receiver Robinson,
Defendant in Error.

(X2546)